

Volume 5

Pages 918 - 1175

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Jacqueline Scott Corley, Judge

FEDERAL TRADE COMMISSION,

Plaintiff,

VS.

MICROSOFT CORPORATION, et al.,

Defendants.

NO. C 23-02880 JSC
SEALED PAGES 923 to 928

San Francisco, California
Thursday, June 29, 2023

TRANSCRIPT OF EVIDENTIARY HEARING PROCEEDINGS

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SEALED PROCEEDINGS

Thursday - June 29, 2023

8:19 a.m.

P R O C E E D I N G S

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(The following pages 923 through 928 were placed under
seal by Order of the Court:)

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(The following proceedings were heard in open court:)

THE CLERK: Court is now in session.

For all of our faithful listeners out there, please remember any recording of this proceeding, either by video, audio, including screenshots and other copying of the hearing is strictly prohibited. Thank you.

THE COURT: All right. Good morning.

So I understand Defendant has called Amy Hood by declaration, which I've received in the record, and FTC has chosen not to cross-examine Ms. Hood.

1 **MR. WEINGARTEN:** Correct, Your Honor.

2 **THE COURT:** So the declaration is admitted into
3 evidence. And then are there exhibits to be admitted with
4 Ms. Hood?

5 **MS. WILKINSON:** There are, Your Honor. PX0083,
6 PX1102, PX4028, PX4029, PX4033, PX4044, PX9009, RX1077, RX1078,
7 RX1079, RX1080, and RX1105.

8 And, Your Honor --

9 **THE COURT:** Yes.

10 **MS. WILKINSON:** -- I assume you have no need to ask
11 her any questions since FTC has decided not to cross-examine
12 her, but she is here in case but I --

13 **THE COURT:** No, I do not.

14 **MS. WILKINSON:** Perfect. Thank you.

15 **THE COURT:** All right. All those exhibits are
16 admitted.

17 (Trial Exhibits 0083, 1102, 4028, 4029, 4033, 4044,
18 9009, 1077, 1078, 1079, 1080, and 1105 received in
19 evidence.)

20 **THE COURT:** Next, Defendants are calling Mr. Singer of
21 Nintendo. I've gone over with the parties and so much of the
22 video deposition involves confidential third-party information,
23 that there's nothing really to show publicly. So I'll review
24 that video deposition in camera.

25 Are there exhibits, then, to be admitted with Mr. Singer?

1 **MS. HILL:** Yes, Your Honor. Defendants would move in
2 RX5060, RX5060A, and RX1212.

3 **THE COURT:** Does the FTC have exhibits?

4 **MS. CIRINCIONE:** Yes, Your Honor. Thank you.
5 PX3218, PX3225, PX3233, PX3234, PX9372, and PX7065.

6 **THE COURT:** Okay. All those exhibits are admitted.
7 (Trial Exhibits RX5060, RX5060A, RX1212, 3218, 3225,
8 3233, 3234, 9372, and 7065 received in evidence.)

9 **MS. HILL:** Thank you, Your Honor.

10 **THE COURT:** And does the FTC have another witness to
11 call.

12 **MR. WEINGARTEN:** We do, Your Honor. The Plaintiff
13 calls Mr. Tim Stuart.

14 (Pause in proceedings.)

15 **MR. WEINGARTEN:** While we're waiting, Your Honor,
16 there was one housekeeping. We had discussed yesterday moving
17 into evidence some of the requests for admission responses that
18 we got, corporate admissions.

19 **THE COURT:** Yes.

20 **MR. WEINGARTEN:** So the exhibit is PX0070, which is
21 Respondent Microsoft's responses and objections to complaint
22 counsel's request for admission.

23 Just logistically, Your Honor, there's only obviously one
24 or two we want to move in as admissions. Would Your Honor want
25 to receive all of it or should we redact the ones we don't --

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1 **THE COURT:** Well, you don't need to redact them. You
2 can just tell me.

3 **MR. WEINGARTEN:** Excerpt it?

4 Okay. It's the response to Request Number 9.

5 **THE COURT:** Number 9?

6 **MR. WEINGARTEN:** Thank you, Your Honor.

7 **THE COURT:** All right. That will be admitted.

8 (Trial Exhibit 0070 received in evidence.)

9 **THE COURT:** Mr. Stuart, if you can stand right there,
10 Ms. Means will swear you.

11 **THE CLERK:** Please raise your right hand.

12 **TIMOTHY STUART,**
13 called as a witness for the Plaintiff, having been duly sworn,
14 testified as follows:

15 **THE CLERK:** Can you please state your name for the
16 record?

17 **THE WITNESS:** Tim Stuart.

18 **THE CLERK:** Thank you.

19 **THE COURT:** You may be seated.

20 **MR. WEINGARTEN:** Can we approach with a binder,
21 Your Honor?

22 **THE COURT:** Please.

23 (Pause in proceedings.)

24 **THE COURT:** You may proceed.

25 \\

STUART - DIRECT / WEINGARTEN**DIRECT EXAMINATION**

BY MR. WEINGARTEN:

Q. Good morning, Mr. Stuart.

A. Good morning.

Q. You are the chief financial officer for Microsoft Gaming; correct?

A. That's correct.

Q. And you are part of the overall Microsoft finance organization; right?

A. That's correct.

Q. My understanding is you report to an intermediate person who then reports to Ms. Amy Hood, the CFO of all of Microsoft?

A. That's correct.

Q. And even though there's a level between you, you do interact with Ms. Hood quite frequently; correct?

A. That's correct.

Q. Especially when it comes to the financials and operations of the Microsoft Gaming business?

A. That's right.

Q. You also sit on the Gaming Leadership Team; right?

A. I do.

Q. And that's the group of senior executives that helps run Microsoft Gaming?

A. That's correct.

Q. Sometimes Gaming Leadership Team is abbreviated GLT?

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1 A. That's right.

2 Q. Now, you are responsible for modeling of the Activision
3 deal value and financials as part of this proposed acquisition
4 that brings us all here; correct?

5 A. Yes, me and my team.

6 Q. And you own the output of the model of the financials and
7 the synergies; correct?

8 A. That's correct.

9 Q. And the code word for that model was Denali; right?

10 A. That's correct.

11 Q. D-E-N-A-L-I?

12 A. Yes.

13 Q. That's like the mountain?

14 A. It is.

15 Q. Okay. And you also sponsor and own the output for the
16 deal model that was created for the ZeniMax acquisition; right?

17 A. That's correct.

18 Q. Now, before we jump into those models, I want to ask you a
19 few questions about some agreements that we've heard about in
20 court.

21 You are not aware of any analysis of the profit and loss
22 impact to Microsoft from Microsoft having executed an agreement
23 with Nintendo about Call of Duty; correct?

24 A. That's correct.

25 Q. You and your team -- strike that.

1 Neither you nor your team has done any analysis of the
2 effect of entering into a listing agreement with Nvidia on the
3 Denali commitments or model; correct?

4 **A.** That's correct.

5 **Q.** And neither you nor your team has done any analysis of the
6 financial implications for Microsoft Gaming that could arise
7 from having entered into an agreement with Boosteroid; right?

8 **A.** Correct.

9 **Q.** And the same thing with respect to any agreement Microsoft
10 entered with Ubitus; correct?

11 **A.** Correct.

12 **Q.** And so on for EE, the cloud provider?

13 **A.** Correct.

14 **Q.** And for Nware, the cloud provider?

15 **A.** Correct.

16 **Q.** Okay. And you and your team have not done any financial
17 analysis of the effects on Microsoft Gaming's business if any
18 of Microsoft's proposals to Sony were actually agreed and
19 executed; right?

20 **A.** That's correct.

21 **Q.** I want to ask you about some information that you shared
22 at the GLT with Mr. Spencer.

23 Now, Microsoft Gaming has something called a close review;
24 is that right?

25 **A.** That's right.

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1 Q. And a close review is a monthly business review that goes
2 over things like the forecast and the budget for Microsoft
3 Gaming; right?

4 A. That's right.

5 Q. And you and your team create the monthly close review
6 presentation; right?

7 A. Correct.

8 Q. And you have a standing monthly meeting to discuss the
9 close review with Mr. Spencer and other members of the GLT;
10 right.

11 A. That's right.

12 Q. It doesn't always happen but it's scheduled?

13 A. Correct.

14 Q. And even if it doesn't happen, I assume the close review
15 deck gets circulated; correct?

16 A. That's right, we'll e-mail it out if it -- if the meeting
17 doesn't happen.

18 Q. Okay. If you can please turn in your binder to
19 Plaintiff's Exhibit 1240. You'll have to skip past all the
20 testimony. Thank you.

21 A. Give me a second to move the papers.

22 Q. Please take your time.

23 (Pause in proceedings.)

24 **THE WITNESS:** You said 1240?

25 \\\

1 **BY MR. WEINGARTEN:**

2 **Q.** Yes, sir.

3 **A.** (Witness examines document.) Okay. I'm here.

4 **Q.** Okay. The first page says "File provided natively," but
5 it indicates that the file is a close deck for April and it's
6 from April of 2022; is that right?

7 **A.** That's correct.

8 **MR. WEINGARTEN:** Okay. The document has been entirely
9 designated as confidential, but I would move to admit
10 Plaintiff's Exhibit 1240, Your Honor?

11 **THE COURT:** Admitted.

12 (Trial Exhibit 1240 received in evidence.)

13 **BY MR. WEINGARTEN:**

14 **Q.** Okay. So let's turn the page, sir, and you'll see the
15 cover page that says "Gaming Review April Results"; right?

16 **A.** Yes.

17 **Q.** Okay. And I'd like to direct your attention in particular
18 to page 019. It's the little pages in -- the little numbers in
19 the bottom corner.

20 And this document contains a lot of data that the GLT uses
21 to manage its business; right?

22 **A.** That's right.

23 **Q.** If you look at Plaintiff's Exhibit 1240-019 --

24 **MR. WEINGARTEN:** I don't think the header is
25 confidential; right? We're okay with that, the title of the

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1 slide?

2 MR. GOSTAN: That's fine.

3 MR. WEINGARTEN: Okay.

4 BY MR. WEINGARTEN:

5 Q. Q3 console market size share, do you see that?

6 A. Yes.

7 Q. Okay. And Microsoft finance reports to the Gaming
8 leadership team about relevant information for the console
9 market; right?

10 A. Correct.

11 Q. And it breaks down the console market into two different
12 components, a Gen 9 core console component and a total console
13 market; right?

14 A. That's correct.

15 Q. And the Gen 9 component of shares excludes the
16 Nintendo Switch and the Generation 8 consoles; right?

17 A. That's correct.

18 Q. And your team each month reports to the Gaming Leadership
19 Team -- if you look in the bottom left -- a share comparison
20 that's just in something called a core Gen 9 market; right?

21 A. Those two lines, that's right, that's the Gen 9 market.

22 Q. Okay. And if you look in the upper right, there are two
23 geographies that are presented with special bar-and-line
24 graphs; right?

25 A. Yes.

1 Q. And the close review breaks out the United States into a
2 separate chart and the other market because historically those
3 tend to be the biggest regions for Xbox; right?

4 A. That's correct.

5 Q. Okay. And, likewise, in the bottom right-hand corner,
6 there is a core Gen 9 market share that's divided up by regions
7 and geographies again; right?

8 A. Correct.

9 Q. The top line there is for the United States alone;
10 correct?

11 A. The top row is United States, yes.

12 Q. Okay. And there's a worldwide number that is put at the
13 bottom of that table; right?

14 A. Yes. These are the markets that we track and we call it
15 worldwide and then total.

16 Q. Okay. And so, for example, Japanese data is not shown
17 here; correct?

18 A. That's correct.

19 Q. And that's because the data in Japan skews quite heavily
20 in favor of Nintendo or Sony because those are Japanese
21 companies; right?

22 A. Among other things. Data is also not as reliable on a
23 quarterly or monthly basis so we exclude it for other reasons
24 too.

25 Q. Okay. And those are the market size and share figures

1 that are shared each month among the members of the Gaming
2 Leadership Team?

3 **A.** That's correct.

4 **Q.** And you can put that aside, sir. Thank you.

5 Now I want to talk to you a little bit about content.

6 Content is a key differentiator for gaming products and
7 services; right?

8 **A.** That's right.

9 **Q.** And without games being available, there's really no
10 reason for a player to be in an ecosystem to play games; right?

11 **A.** That seems reasonable.

12 **Q.** And for a video game subscription service, let's focus on
13 that kind of gaming service.

14 For a subscription service to scale up and reach scale,
15 that requires having a robust content pipeline; right?

16 **A.** Yes.

17 **Q.** And Microsoft Gaming under Mr. Spencer's leadership has
18 been spending money to acquire video game studios for the last
19 several years; right?

20 **A.** That's correct.

21 **Q.** And has engaged in a series of acquisitions leading up to
22 the, again, present acquisition that's the reason we're all
23 here today?

24 **A.** That's right.

25 **Q.** And have you ever heard the amount of money that's been

1 spent as a dump truck full of money over the years?

2 **A.** I have a friend at work that likes to say "dump trucks of
3 money" and I've repeated it back to him.

4 **Q.** Okay. And so you were talking about the Microsoft surge?
5 Is that another fair way to describe this acquisition period
6 that's been underway for a couple of years?

7 **A.** I would just say we have been acquiring companies over the
8 last few years.

9 **Q.** I see. And informally with your friend you refer to it as
10 spending dump trucks of money on content; right?

11 **A.** He said that to me once and I rephrased it back to him.

12 **Q.** Okay. And it's your view that a pipeline of content helps
13 drive user or consumer decisions about a subscription service
14 or an ecosystem for video games; right?

15 **A.** Yes, content is a big piece of that puzzle.

16 **Q.** Okay. And we'll get to the model in more detail, but the
17 Activision acquisition as its modeled in the Denali model has a
18 component that talks about the impact of the Activision content
19 on Microsoft Game Pass; right?

20 **A.** That's right.

21 **Q.** And that's because when you add that content, it helps
22 create another reason for someone to subscribe to Game Pass;
23 right?

24 **A.** That's right.

25 **Q.** And the theory is that new users subscribe and existing

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1 users play more and the hours go up and engagement goes up and
2 so on; right?

3 **A.** That's the rough theory, that's right.

4 **Q.** Okay. There is a correlation, at least in some sense,
5 between content and engagement and revenue on a subscription
6 service; right?

7 **A.** Yes. You have to have good games to play and you have to
8 have reasons to come in and play in service.

9 **Q.** Okay. I want to talk to you about the subscription and
10 Game Pass offerings in a little more detail.

11 Could you please turn to PX1151?

12 **A.** (Witness examines document.) Yes, I'm here.

13 **Q.** This is an e-mail at PX1151 that is dated March 29th,
14 2022, and it's from you to Ms. Hood; right?

15 **A.** That's correct.

16 **Q.** And it's also to a gentleman named Bill Duff. Is Mr. Duff
17 your direct manager?

18 **A.** That's right.

19 **Q.** So then he reports in turn to Ms. Hood?

20 **A.** Correct.

21 **Q.** Okay.

22 **MR. WEINGARTEN:** Your Honor, move to admit PX1151.

23 **THE COURT:** Admitted.

24 (Trial Exhibit 1151 received in evidence.)

25 **MR. WEINGARTEN:** Thank you.

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1 BY MR. WEINGARTEN:

2 Q. We'll talk around the document. I believe it's --
3 actually, I don't have it marked as confidential.

4 MR. WEINGARTEN: Karen, this one is okay?

5 MR. GOSTAN: There's a portion underneath --

6 MR. WEINGARTEN: Okay. I'll talk around that.

7 MR. GOSTAN: Yeah.

8 MR. WEINGARTEN: Okay.

9 MR. GOSTAN: Where it starts "There is an
10 opportunity."

11 MR. WEINGARTEN: Okay. Got it.

12 BY MR. WEINGARTEN:

13 Q. So the unredacted portion, sir, we can talk to is the top
14 bit where you've laid out a table, and the table lays out a
15 comparison of the tiers and the pricing for Sony's subscription
16 service and Xbox's subscription services; right?

17 A. That's correct.

18 Q. And so for the PlayStation at this time a year and a half
19 or so ago there's PS Plus Essential, PS Plus Extra, and PS Plus
20 Premium; right?

21 A. That's right.

22 Q. And under the Xbox, the tiers are XBL Gold, which stands
23 for Xbox Live Gold; right?

24 A. Correct.

25 Q. Then there's XGP, which is Xbox Game Pass; right?

1 **A.** That's right.

2 **Q.** And X, I think that says BP, but is it supposed to be XGP
3 Ultimate?

4 **A.** That's correct.

5 **Q.** Okay. So it should be Xbox Game Pass Ultimate is the
6 final tier; right?

7 **A.** Correct.

8 **Q.** And for each of the tiers you've listed the price and
9 you've listed the features; right?

10 **A.** That's correct.

11 **Q.** And you wrote to Ms. Hood and Mr. Duff (as read):

12 "Wanted to send over my quick take on Sony's announce
13 of their Game Pass compete and subscription tiers."
14 Do you see that?

15 **A.** Yes.

16 **Q.** And you included an article, and you say (as read):

17 "I created the table below to detail the high-level
18 features within each tier and what it includes versus Xbox
19 today."
20 Do you see that?

21 **A.** That's right.

22 **Q.** Now, I won't read this part aloud and neither should you,
23 sir, but look under the table. Do you see the part that says
24 "There is"?

25 **A.** Yes.

1 Q. That opportunity -- well, let's try it this way: Take a
2 look at that word "opportunity," and then I want you to turn in
3 your investigational hearing transcript, which is at the very
4 beginning of your binder, to page 101 -- well, actually I can
5 do it -- maybe we can do it a little bit easier. Sorry.

6 Let's stick at 1151. Do you see the word "opportunity"?

7 A. Yes.

8 Q. The next sentence is about what that opportunity is;
9 right?

10 A. That's right.

11 Q. Okay. And so it's ability to blank is the opportunity;
12 right?

13 A. Yes.

14 Q. Okay. And this is based on a benchmarking of Xbox's
15 subscription service against the PlayStation subscription
16 service; right?

17 A. Yes, based on value to the consumer. I believe we have
18 "opportunity" here.

19 Q. All right. And you believed at the time you wrote this
20 that Xbox was providing a more compelling service; correct?

21 A. I do.

22 Q. And that's because there was more content on the Xbox
23 service and, therefore, more value for customers than the Sony
24 service?

25 A. In addition to what I call out here, which is our

1 first-party day and date strategy in addition to the games that
2 we have in service.

3 Q. Okay. So having first-party day and date go into Xbox's
4 subscription service is an advantage, in your view, versus
5 Sony's model?

6 A. I believe it provides more value to the consumer.

7 Q. And a more -- another reason for a consumer to engage with
8 or subscribe to Xbox's product; right?

9 A. That's right.

10 Q. And I think we've established this before, but having
11 high-quality titles, having key titles, that's important to
12 content subscriptions because that drives hours and engagement;
13 right?

14 A. That's right. You need quality content for people both to
15 subscribe and to want to stay in the service.

16 Q. You can set that one aside. Thank you, sir.

17 Now I want to talk a little bit about the two kinds of
18 Xboxes, the Xbox series consoles that are offered; right? So
19 there's an Xbox Series X and there's an Xbox Series S; right?

20 A. That's right.

21 Q. And the X is priced at 499?

22 A. Yes.

23 Q. And the S is 299?

24 A. That's correct.

25 Q. Now the S is cheaper but the pricing strategy was to be an

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1 entry point into the Gen 9 console market; correct?

2 **A.** Less about an entry point Gen 9 or otherwise. It's a
3 cheaper box relative to what consumers may want to pay at that
4 price point.

5 **Q.** Well, the function of going -- it's a -- let me strike
6 that.

7 So the generation -- the Xbox S is a Gen 9 console; right?

8 **A.** Gen 9 is kind of an inside baseball term. In any event,
9 the console also competes against other products in the market.

10 **Q.** Okay. Let me ask you to turn, please to page -- PX4380.

11 **A.** (Witness examines document.)

12 **Q.** Now -- yeah, go ahead. Please, take your time.

13 **A.** (Witness examines document.) Okay.

14 **Q.** Okay. Plaintiff's Exhibit 4380 is another e-mail from you
15 and this one is to Ms. Hood, Mr. Nadella, Mr. Spencer, and to
16 Mr. Jerret West dated September 16, 2020; correct?

17 **A.** That's right.

18 **MR. WEINGARTEN:** I move to admit PX4380, Your Honor.

19 **THE COURT:** Admitted.

20 (Trial Exhibit 4380 received in evidence.)

21 **BY MR. WEINGARTEN:**

22 **Q.** Now, September of 2020 when this e-mail was sent, that's
23 around the time when the Xbox series consoles were going to
24 launch; right?

25 **A.** That's right.

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1 Q. And you're talking in this e-mail about some pricing news
2 that Sony had announced for the PlayStation 5; right?

3 A. That's correct.

4 Q. So Sony had put out some information about what their
5 Gen 9 console would be priced at; right?

6 A. That's right.

7 Q. And you are updating Microsoft's chief financial officer,
8 its chief executive officer, the gaming chief executive
9 officer, and others about the Sony pricing news; right?

10 A. That's right.

11 Q. And you are updating them about how the Xbox offering
12 compares on feature and price to the PlayStation offering;
13 right?

14 A. That's right.

15 Q. And if you look at the -- do you see where it says
16 "Relative to Xbox offering"?

17 A. Yes.

18 Q. Don't read it out loud. I believe this has been redacted.
19 Look at the second bullet.

20 A. Uh-huh.

21 Q. "We will have the best." Do you see that?

22 A. Yes.

23 Q. Read that to yourself.

24 A. (Witness examines document.) Yep.

25 Q. Now that was an accurate description of the Series S price

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1 point and pricing when you wrote that to Ms. Hood, Mr. Nadella,
2 and Mr. Spencer; right?

3 **A.** That's right. This is relative to what Sony had just
4 announced so I'm benchmarking it against that.

5 **Q.** Okay. And is it still your testimony that the Xbox S is
6 not a Generation 9 console?

7 **A.** It's a Gen 9 console.

8 **Q.** Okay. So the S is a Gen 9 console?

9 **A.** Yes.

10 **Q.** Let's take a look, please, at PX4905 just a few tabs
11 further.

12 **A.** (Witness examines document.) Yes, I'm here.

13 **Q.** So this is an e-mail from you to Mr. Spencer and others
14 from about two years later, August of 2022; right?

15 **A.** That's correct.

16 **MR. WEINGARTEN:** Move to admit PX4905.

17 **THE COURT:** Admitted.

18 (Trial Exhibit 4905 received in evidence.)

19 **BY MR. WEINGARTEN:**

20 **Q.** Now, here again, you're informing Mr. Spencer and some
21 others about some pricing moves from Sony; right?

22 **A.** That's correct.

23 **Q.** And you're talking about some foreign exchange effects and
24 other pricing differences between the Xbox X and the Sony
25 PlayStation 5; right?

1 **A.** That's right.

2 **Q.** And the Xbox S and the PlayStation 5; right?

3 **A.** Correct.

4 **Q.** Okay. So, once again, two years after launch you're
5 informing leadership about the relative pricing of the Series X
6 and S versus the PlayStation 5; right?

7 **A.** That's correct.

8 **Q.** You can set that aside, please, sir.

9 Now I would like to talk to you about the Denali model.

10 The Denali model is the model for Microsoft's acquisition
11 of Activision; right?

12 **A.** That's correct.

13 **Q.** It's the model that was created and used to present
14 information to the Microsoft Board of Directors about the deal;
15 right?

16 **A.** That's correct.

17 **Q.** And the Denali model assumed that Activision's existing
18 businesses would continue to operate just as they were before
19 acquisition; right?

20 **A.** We have an existing business assumption. I wouldn't say
21 just as. There's a line in there for that.

22 **Q.** Okay. So in the model there's a line that's an output
23 line for the existing Activision business; right?

24 **A.** That's right.

25 **Q.** And the model assumes for the existing business no major

1 changes in platform strategy, for example?

2 **A.** That's correct.

3 **Q.** Now, with respect to the ZeniMax deal model, that was also
4 a model that you created and owned and your team created and
5 owned; right?

6 **A.** That's correct.

7 **Q.** That model for ZeniMax also went to the board as part of
8 its consideration of the ZeniMax deal; right?

9 **A.** That's correct.

10 **Q.** And you made the same assumption with respect to the
11 ZeniMax model; namely, the ZeniMax existing business, if it was
12 met -- multiplatform, would continue as it was for the existing
13 business line; right?

14 **A.** That's right.

15 **Q.** So the ZeniMax model, like the Activision Denali model,
16 assumes that ZeniMax content will continue to be available on
17 Xbox and other platforms; right?

18 **A.** We have an existing business line that continues, that's
19 right.

20 **Q.** And that's the assumption in the existing business line
21 for both models; right?

22 **A.** Yes.

23 **Q.** And the model for ZeniMax assumed that there would be
24 non-Xbox platform revenue going forward for ZeniMax titles;
25 right?

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1 A. That's right.

2 Q. So too for the Activision model; right?

3 A. Correct.

4 Q. Okay. Now, at some point the model that gets presented to
5 the board of directors becomes what is called a final go/no go
6 model; right?

7 A. That's right.

8 Q. And the final go/no go is sort of the -- the model and the
9 output as they are when the final decision on whether to make
10 the acquisition is going to occur?

11 A. Yes. We make any final edits or adjustments since the
12 deal was approved to when the deal gets signed.

13 Q. Okay. And once the final go/no go version is set, fair to
14 say the Denali model is basically locked at that point;
15 correct?

16 A. The valuation is set as a commitment. The model obviously
17 changes over time, but the valuations, our commitment, that
18 gets locked at the final go/no go.

19 Q. Okay. So the model you can keep adjusting and using the
20 model as you need for your business needs?

21 A. We don't change the core model that goes in the final
22 go/no go. Likewise, we don't change the board deck. We lock
23 the valuation and then move forward with the business.

24 Q. Okay. So, for example, in the case of Activision, after
25 the Denali model was set and the outputs and the commitments

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1 were set, there came a time when the Activision negotiating
2 team gave Microsoft some updated information about its
3 financials; right?

4 **A.** That's right.

5 **Q.** And there was information about the financials that
6 differed from the information that had been used to build the
7 existing business Denali model; right?

8 **A.** We would get updates throughout the course that
9 highlighted trends or changes in the business.

10 **Q.** Do you remember a particular change that was of a greater
11 magnitude perhaps than some of the others?

12 **A.** Not specifically, no.

13 **Q.** Okay. Let me refer you then -- would it help you refresh
14 your recollection if we looked at your deposition?

15 **A.** Sure.

16 **Q.** Okay. Let's turn to your deposition, please. We have a
17 lot of transcript there. It's the smaller one I think, but
18 it's the one that says "Remote Videotaped Deposition," PX7040.

19 **A.** All right. Did you have a page for that one?

20 **Q.** I do. So in PX7040, can you please turn to little
21 page 39. It's the transcript page 39.

22 **A.** (Witness examines document.)

23 **Q.** Actually, it's pages 38 and 39. So when you get there,
24 read to yourself, please, page 38, line 19, through 39:3. Take
25 your time.

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1 A. (Witness examines document.) All right. 19 through
2 where?

3 Q. Yep. Little page 38, line 19, that starts "Do you
4 remember" and it ends with an answer on page 39 on the top.
5 Take a look at that and let me know when you've had a chance to
6 read it.

7 A. (Witness examines document.) Yes, I'm familiar with this.

8 Q. Okay. So does that refresh your recollection, sir, that
9 early in January 2022, the Activision negotiating team
10 communicated that it was going to be revising the Activision
11 financials in the manner that's described in that question and
12 answer?

13 A. That's right. They had submitted to us an updated
14 forecast for their business.

15 Q. So in January 2022, before the deal was announced,
16 Activision sent over a revision and the revision was of that
17 magnitude that's described in page 38, line 22; right?

18 A. That's right.

19 Q. Not a small revision; correct?

20 A. I would say it's relatively small when you're talking
21 about a ten-year model with terminal value in it.

22 Q. Okay.

23 A. This is specific to one title in the current year.

24 Q. Okay. And that revision of the financials was not
25 incorporated into the Denali deal model; right?

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1 **A.** That's correct. The output of that was not extremely
2 meaningful to the valuation.

3 **Q.** And because in part the deal model was locked so the
4 events, the change in assumptions did not need to be reflected?

5 **A.** This specific change here, I did not deem it worthy to run
6 through the model, and we had the board model already
7 completed.

8 **Q.** Okay. So this one you didn't reflect in the model?

9 **A.** We -- the board model was locked after this point. We did
10 not go back and update things to the board.

11 **Q.** And you didn't update before it got to the board with this
12 new information; right?

13 **A.** That's correct. Our commitment's to the valuation.

14 **Q.** Now, you can put that aside.

15 I want to talk to you a little bit about ZeniMax.

16 Do you remember representing Xbox at an investor
17 conversation that the Jefferies Investment Bank hosted in
18 November of 2020?

19 **A.** I do.

20 **Q.** Okay. That's shortly after Microsoft's acquisition of
21 ZeniMax was announced; right?

22 **A.** That's correct.

23 **Q.** And it's around the time that the new Xbox Gen 9 consoles
24 are launching; right?

25 **A.** It's around the time that Series S and Series X launched,

1 that's right.

2 Q. Okay. And you were on a Q and A panel or interview on
3 a -- for an audience; right?

4 A. It was an investor conference, that's right.

5 Q. You were on a stage and you were asked questions?

6 A. I don't recall if it was virtual or on stage, but I'm
7 asked questions.

8 Q. Okay. And when asked about ZeniMax content, you told the
9 audience that Microsoft Gaming did not have any intention of
10 just pulling all of the ZeniMax content off of Sony, Nintendo,
11 or otherwise; right?

12 A. That's right.

13 Q. And sometimes, just so the record's clear, people use the
14 word "ZeniMax" or they use the word "Bethesda" interchangeably
15 to refer to that company; right?

16 A. That's right.

17 Q. Because Bethesda is, I guess, technically the studio that
18 makes the content?

19 A. One of the studios but the biggest one, yeah.

20 Q. Okay. If we use ZeniMax and Bethesda interchangeably, you
21 understand what we mean?

22 A. Yes.

23 Q. Okay. And then you told the audience after you had told
24 them Microsoft was not going to be pulling any content away,
25 you said (as read):

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1 "But what we want is we want that content in the long
2 run to be either first or better or best or pick your
3 differentiated experience on our platforms."

4 Do you remember telling the audience that?

5 **A.** Can I just look at the transcript? You said "any" and I
6 refer -- I think I said "all." I just want to make sure I was
7 clear what you asked me.

8 **Q.** Yeah, no. Let's take a look.

9 So if you look in your binder at PX9192, that's the
10 transcript.

11 **A.** (Witness examines document.)

12 **THE COURT:** The last one.

13 **THE WITNESS:** Sorry. Just give me a second.

14 **MR. WEINGARTEN:** It always is.

15 (Pause in proceedings.)

16 **THE WITNESS:** Thank you, Your Honor.

17 (Witness examines document.) Okay. I'm here.

18 **BY MR. WEINGARTEN:**

19 **Q.** Okay. So PX9192 is a transcript of a Microsoft
20 Corporation management presentation at a Jefferies Interactive
21 Entertainment Virtual Conference. Do you see that?

22 **A.** Yes.

23 **Q.** And the transcript is of a conference event held on
24 November 12th, 2020, and you are listed as the company
25 participant; right?

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1 **A.** Correct.

2 **Q.** Okay. And you have no reason to doubt the accuracy of
3 this transcript; right?

4 **A.** That's right.

5 **Q.** Okay.

6 **MR. WEINGARTEN:** Move to admit PX9192, Your Honor.

7 **THE COURT:** Admitted.

8 (Trial Exhibit 9192 received in evidence.)

9 **BY MR. WEINGARTEN:**

10 **Q.** Okay. Let's take a look at page 014, please.

11 **A.** (Witness examines document.) Okay.

12 **Q.** And if you look at the second paragraph, there's that
13 sentence about "In the long run is we don't have intentions of
14 just pulling all of Bethesda content" -- does that say off of?

15 **A.** Out of.

16 **Q.** -- "out of Sony or Nintendo or otherwise."

17 **A.** Yes. I said "all" there. I think you said "any" when you
18 asked me the question.

19 **Q.** I'm sorry.

20 Okay. And then the next line was (as read):

21 "But what we want is we want that content in the long
22 run to be either first or better or best or pick your
23 differentiated experience on our platforms. We want" --
24 "We will want Bethesda content to show up the best as on
25 our platforms."

1 Do you see that?

2 A. I do.

3 Q. And that's what you told the participants from the public
4 at the investor conference; right?

5 A. That's right.

6 Q. And I just want to ask you a couple of questions about
7 that.

8 So "first" could mean showing up first on a Microsoft
9 platform as compared to another platform; right?

10 A. It could be, like what we've done with Starfield, that's
11 right.

12 Q. And "better" could mean, for example, that the game has
13 better resolution on a Microsoft platform as opposed to a
14 non-Microsoft platform; right?

15 A. I didn't mean that in this scenario, no. I was looking
16 through the consumer lens of what "better" or "best" would
17 mean.

18 Q. Well, having better resolution is better from a consumer
19 perspective when playing a game; right?

20 A. Resolution is one thing. Frame rate's another thing.
21 There are many things you can use the word "best" for. I was
22 being pretty vague in my answers here pretty specifically. We
23 hadn't had plans at this point.

24 Q. Okay. Let me -- "first" or "better" or "best" could also
25 refer to other characteristics or features of the content that

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1 would be better on the Microsoft platform as opposed to the
2 non-Microsoft platform; right?

3 **A.** I didn't define it when I was talking here. Again, I was
4 being specifically vague at this point. We had just closed the
5 acquisition and I was talking about experiences we -- things we
6 can do with ZeniMax. I wasn't being specific one way or the
7 other.

8 **Q.** I understand you didn't make specifics at the conference;
9 but as you understand it, when you used terms like "first,"
10 "better," or "best," some of that could be referring to timing
11 of when the content is released; right?

12 **A.** Yeah. If you're a consumer it could mean a lot of things.
13 It could mean resolution. It could be timing. It could be
14 some notion of downloadable content. I wasn't referring to any
15 of those in this -- this conversation here.

16 **Q.** You weren't referring to them explicitly, but that is the
17 meaning that you agree is implied in "first," "better," and
18 "best"; right?

19 **A.** I think a consumer could read that in any way. When I was
20 referencing it here, it's things like Starfield, how we're
21 bringing that to our platform or showing up in Game Pass is a
22 great experience for consumers.

23 **Q.** Let me ask you, please, to look in your deposition at
24 page 257.

25 **A.** Is it 7040?

1 Q. Yes, sir?

2 A. Okay.

3 (Witness examines document.) Yes, I'm here.

4 Q. Okay. And if you look at page 257, starting at line 15
5 (as read):

6 "QUESTION: Yeah. When you say 'first on our platforms,'
7 that necessarily means first on our platforms as compared
8 to other platforms; right?

9 "ANSWER: As a vague example, it could be, that's right.
10 Again, it's title by title. So when I say 'first tier,'
11 it could be timing. It could be at a certain place.
12 'Better' could be showing up in resolution, safety,
13 security.

14 "Again, I'm giving some very vague examples here of
15 what that could look like."

16 That was your testimony; right?

17 A. That's right.

18 Q. That was truthful and accurate; right?

19 A. That's right.

20 Q. Okay. So "first," "better," "best" could include lots of
21 different kinds of features or timing or other things; right?

22 A. Yes. It could be many things as defined by whoever's
23 reading "first," "better," or "best."

24 Q. Okay. And then you said in your transcript of the
25 Jefferies conference (as read):

1 "Yes, that's not a point about being exclusive.

2 That's not a point about where being adjusting time and
3 content or road map; but if you think about something like
4 GP, if it shows up best in Game Pass, that's where we want
5 to see and we want to drive our Game Pass subscriber base
6 through that Bethesda pipeline."

7 Do you remember saying that?

8 **A.** Yes.

9 **Q.** And you also said at the conference to the public (as
10 read):

11 "So, again, I'm not announcing pulling content from
12 platforms one way or the other, but I suspect you'll
13 continue to see us shift towards a first or better or best
14 approach on our platforms."

15 Do you see that?

16 **A.** I can go back. I believe you, yes.

17 **Q.** Do you remember saying that?

18 **A.** Yes.

19 **Q.** Okay. And do you still believe that to be true as a
20 statement?

21 **A.** I believe showing up in things like Game Pass, like I
22 said, is a great experience for customers. It could be one of
23 the best if that's how they play.

24 Again, things like Starfield and Redfall did show up first
25 on Xbox so we're following through on the things I said there.

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1 Q. And you were being vague, deliberately so, for the
2 audience. You didn't want to make any announcements at that
3 conference; right?

4 A. Correct. When I'm talking to investors about long-range
5 planning when there's no plans, I wouldn't announce anything
6 specific.

7 Q. But even though you were vague, you believe that there
8 would continue to be a shift to a first or better or best
9 approach on Microsoft platforms; right?

10 A. Again, as evidenced by Starfield, we launched that
11 exclusively on our platform, that's an example of one of those
12 potentially.

13 Q. And after the Jefferies conference, do you remember
14 talking or chatting with Mr. Spencer about your comments that
15 you made at the Jefferies conference?

16 A. I do.

17 Q. Let's look, please, at Plaintiff's Exhibit 4377.

18 A. (Witness examines document.) Okay. I'm here.

19 Q. 4377 is in camera. It's confidential so don't read any of
20 it out loud, please.

21 But this is a transcript of a chat between you and
22 Mr. Spencer dated November 17th, 2020. Do you see that?

23 A. That's right.

24 MR. WEINGARTEN: And move to admit Plaintiff's
25 Exhibit 4377.

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1 **THE COURT:** Admitted.

2 (Trial Exhibit 4377 received in evidence.)

3 **BY MR. WEINGARTEN:**

4 **Q.** So this is just a short period of time after the Jefferies
5 conference; right?

6 **A.** That's right.

7 **Q.** Okay. And Mr. Spencer on page 002 of PX4377 towards the
8 bottom says that you're --

9 **MR. WEINGARTEN:** Can I read that one, "Your words sure
10 did"?

11 (Pause in proceedings.)

12 **MR. GOSTAN:** Yeah, you can read that.

13 **BY MR. WEINGARTEN:**

14 **Q.** So Mr. Spencer says (as read):

15 "Your words sure did stir up a lot of stuff."

16 And then you responded, and I think we already did this in
17 public session, you wrote (as read):

18 "Wish we could just go out and say we are taking it
19 all exclusive at this point."

20 Mr. Spencer wrote back and said (as read):

21 "Yeah, we just can't say. I think it was the first
22 and best that got people going."

23 And he continued (as read):

24 "First assumes there is a second on PS."

25 And you wrote (as read):

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1 "That's right. Needed to thread the needle versus
2 saying we don't intend to make any changes."

3 Do you see that?

4 **A.** Yes.

5 **Q.** That was your conversation with Mr. Spencer, right, after
6 the Jefferies conference?

7 **A.** Yeah, that's right.

8 **Q.** And when you said, "Wish we could just go out and say we
9 are taking it all exclusive at this point," "it all" means the
10 ZeniMax titles?

11 **A.** Yes. We aren't obviously able to say that, but that's
12 what I said here.

13 **Q.** Okay. And PS -- when Mr. Spencer writes "First assumes
14 there is a second on PS," you understand "PS" to mean
15 PlayStation?

16 **A.** That's correct.

17 **Q.** Okay. Now, Mr. Spencer makes the ultimate decisions about
18 whether content that Microsoft owns is going to become
19 exclusive to Microsoft in any way; right?

20 **A.** That's correct.

21 **Q.** All right. You can put that aside, please.

22 Let's take a look at Plaintiff's Exhibit 4376, please.

23 **A.** (Witness examines document.) Okay. I'm here.

24 **Q.** This is another short chat transcript. This one is
25 between you and Mr. Matt Booty; right?

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1 **A.** That's right.

2 **Q.** Mr. Booty is the head of Microsoft's in-house game
3 studios; right?

4 **A.** That's correct.

5 **Q.** Okay. And those are sometimes called the first-party
6 studios; right?

7 **A.** That's right.

8 **Q.** The date of this transcript is December 1st, 2020; right?

9 **A.** Yes.

10 **MR. WEINGARTEN:** Move to admit Plaintiff's
11 Exhibit 4376, please.

12 **THE COURT:** Admitted.

13 (Trial Exhibit 4376 received in evidence.)

14 **BY MR. WEINGARTEN:**

15 **Q.** Now, Mr. Booty is writing to you about getting somebody's
16 perspective on exclusivity -- oh, strike that.

17 You write at the beginning of this chat (as read):

18 "Getting their perspective on exclusivity will be
19 fascinating. Example, are they wanting to go a single
20 platform and deal with the huge fan backlash that they've
21 built over years?"

22 Do you see that?

23 **A.** I do.

24 **Q.** That's -- "their perspective" is referring to the
25 perspective of ZeniMax executives; right?

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1 **A.** I believe that's right.

2 **Q.** Okay. And you're talking there about getting the ZeniMax
3 executives' perspective on taking content exclusive; right?

4 **A.** Yeah. Part of the decision to do something like that that
5 Phil would make was get input from those making the games.

6 **Q.** Uh-huh. And Mr. Booty responds and you say "I like that
7 perspective."

8 And then Mr. Booty says (as read):

9 "The only wrinkle in that plan" --

10 **MR. GOSTAN:** James, that part has been redacted.

11 **MR. WEINGARTEN:** Oh.

12 **MR. GOSTAN:** You can just not say the number.

13 **MR. WEINGARTEN:** Okay. Thank you for letting me know.

14 **BY MR. WEINGARTEN:**

15 **Q.** (as read):

16 "The only wrinkle in that plan is that we have
17 blank" -- you see the number -- "units each on the
18 PlayStation for some titles there."

19 Do you see that?

20 **A.** I do see that.

21 **Q.** Okay. And then Mr. Booty continues (as read):

22 "But the upside to XGP and console sales might offset
23 that."

24 Do you see that?

25 **A.** I do see that.

1 Q. So you understood Mr. Booty to be saying that taking some
2 content exclusive has a wrinkle because you lose sales on the
3 PlayStation platform; right?

4 A. That's right.

5 Q. But there's an upside to offset that loss and the upside
6 has two components, a component that benefits Game Pass; right?

7 A. That's right.

8 Q. And a component that benefits console sales; right?

9 A. I see his comment there about that. In our deal models we
10 don't reflect console sale change.

11 Q. I understand. In your response, though, to Mr. Booty was
12 (as read):

13 "Right. That's the concern on valuation; but if we
14 can paint a higher XGP subgrowth, more Xbox units, and
15 more share could be an offset."

16 So you said, Right," those three things -- Xbox Game Pass
17 subscriber growth, more Xbox units, and more share -- could
18 offset the loss from taking some games exclusive; right?

19 A. Yes. My team and I do various scenario analysis of how to
20 think about valuation. These are some of the options you could
21 pick. I obviously don't pick all of them, but those are some
22 of the options.

23 Q. Okay. And actually you tell him some more good news. You
24 say (as read):

25 "Due to cash flow discounting, we don't need to make

1 up that full AM in today's dollars."

2 And that "AM," that's a Microsoft term for accountability
3 margin; right?

4 A. That's right.

5 Q. That's like profit?

6 A. Yes.

7 Q. So the gaming business makes AM or profit?

8 A. That's right.

9 Q. Okay. And so you're telling Mr. Booty that because the
10 valuation goes out, as you've told us now in court a few times,
11 ten years, you actually need fewer dollars today to make up for
12 some of those effects that are ten years in the future if you
13 take titles off; right?

14 A. Potentially, but pulling things out of the model early in
15 the years has a much bigger impact on your cash flow discount.

16 Q. Okay. But according to what you told Mr. Booty is "Due to
17 cash flow discounting, we don't need to make up that full AM
18 with today's dollars"; right?

19 A. That's right. It's discounted over time.

20 Q. And you're talking about the concern on valuation. The
21 valuation you're referring to there, that's the commitment to
22 the board; right?

23 A. That's right. That's the number we have to hit.

24 Q. And so even if you take an action or Microsoft Gaming
25 takes an action that could impact that valuation to the board,

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1 there are other actions and strategies that Microsoft can
2 deploy to try to continue to hit that number; right?

3 **A.** Yeah, there are various scenarios you can do to hit the
4 commitments over ten years.

5 **Q.** Okay. You can put that aside.

6 I have a couple more questions for you about hitting the
7 numbers.

8 Now, you're familiar with a Project Neutrino model?

9 **A.** Yes.

10 **Q.** And Neutrino was an analysis of scenarios around different
11 ZeniMax titles and options for exclusivity; right?

12 **A.** I believe so, yes.

13 **Q.** And Neutrino involved five different scenarios for ZeniMax
14 content; right?

15 **A.** Yes.

16 **Q.** Okay. Let's please turn in your binder to PX1966.

17 **A.** (Witness examines document.) Yes, I'm here.

18 **Q.** I'm sorry. The type is small, but PX1966, you can see
19 it's a chat transcript; right?

20 **A.** That's right.

21 **Q.** And you can see it's dated February 9th, 2021; right?

22 **A.** Correct.

23 **Q.** And if you look at the initial participants, you can look
24 through there and you're one of them; right?

25 **A.** That's right.

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1 Q. And Mr. Spencer is a participant; right? Third line there
2 it says "Phil SP at Microsoft"?

3 A. Yep, I see it.

4 Q. Okay. And the next e-mail over, Ms. Bond --

5 A. Yep.

6 Q. -- is a participant?

7 And several of the other leaders of the Microsoft Gaming
8 business; right?

9 A. That's right.

10 Q. Okay. At some point in the chat there is a figure
11 attached; and if you look at page 008, it's a figure that says
12 five scenarios. Do you see that?

13 A. I do.

14 Q. Okay. And is this a summary of five potential scenarios
15 with respect to ZeniMax content after Microsoft completes its
16 acquisition of ZeniMax?

17 A. That's right. The marketing team had put together a few
18 scenarios of options to deal with the ZeniMax business.

19 Q. And if you look, please, at PX1966-003, if you look at
20 the -- one, two, three, four, five -- sixth chat, it's got a
21 bold "Edited." So I guess you edited it. After you wrote it,
22 you kind of made a correction or something; right?

23 A. Likely, yes.

24 Q. If you look at the bold one that says "Edited," and you'll
25 say (as read):

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1 "Will want to paint the picture of what we need to
2 believe to make number five work within the deal model
3 constraints.

4 "Example: We are committed to X. We're making a
5 change to the road map and still going to hit X through
6 these strategies."

7 Do you see that?

8 **A.** That's right. If we're going to hit the valuation, we
9 have to -- and there's a change to the road map, we still have
10 to make sure we make up for it.

11 **Q.** So if one of the strategies that's presented in the
12 Neutrino -- well, strike that. Let me ask you.

13 The five scenarios that we looked at at the back, those
14 are the Neutrino scenarios; right?

15 **A.** I believe that's right.

16 **Q.** So depending on what Neutrino scenario Microsoft Gaming
17 considers, that will have an impact on meeting the commitments
18 in the valuation for ZeniMax; right?

19 **A.** That's right.

20 **Q.** And you get a gap, a number that tells you, okay, here's
21 the commitment and if we do this strategy, here's the
22 shortfall; right?

23 **A.** In a scenario analysis that's right. Again, this was a
24 marketing team that put this together; but you're right on
25 the -- if there's a gap, you have to make up for it.

1 Q. Right. And if there's a gap, then one of your
2 responsibilities is to help the team think about, if they
3 implement the strategy, how to fill back up the gap, other ways
4 to get back to the valuation number; right?

5 A. That's right. That's a core part of my job.

6 Q. Okay. And in your chat you reference number five, and
7 that's number five of the five scenarios presented on page 008?

8 A. That's right.

9 Q. And the scenarios run from one to five. One is fully
10 cross platform; right?

11 A. Correct.

12 Q. And it runs through various degrees of exclusivity to
13 five, Xbox focused; right?

14 A. That's right.

15 Q. So you're talking in this chat about what do we do if we
16 choose number five; right?

17 A. Yes. I'm reminding the team that if we choose any of the
18 scenarios and it has an impact on anything, we need to make
19 sure we hit the valuation.

20 Q. Right. And the picture here of the five scenarios, it
21 says -- it use the word "Adam." Was "Adam" a code name for
22 ZeniMax?

23 A. That's right.

24 Q. Okay. So when we see "Adam" there, we can understand that
25 to mean ZeniMax?

1 **A.** Correct.

2 **Q.** Okay. Now, going back to the chat, there's quite a bit of
3 response to your chat about number five and still trying to hit
4 the valuation with other strategies; right?

5 **A.** I can read through it if you'd like me to.

6 **Q.** Well, there's just other chats that are -- take your --
7 take a minute, if you like, but those other chats down below,
8 they're responsive?

9 **A.** Yeah, that's right.

10 **Q.** Okay. For example, Mr. West writes at 8:38 and 15 seconds
11 (as read):

12 "I think combining Tim and Sarah's point would be a
13 good way to respond to Phil's intuition. There is
14 significant upside to number five. We might see a huge AC
15 number on Game Pass for these tentpole releases."

16 Do you see that?

17 **A.** I do.

18 **Q.** That was one of the senior executive's responses to your
19 reminder about the valuation model and the commitments; right?

20 **A.** Yeah. It looks like he was giving his opinion on possible
21 scenarios there.

22 **Q.** And was there a conversation about how some of the folks
23 at ZeniMax would respond to this idea if number five were
24 implemented?

25 **A.** I don't know about directly. We just talked about we

1 wanted to get perspective from the team. I don't recall a
2 specific conversation about that.

3 Q. Okay. Take a look -- turn to page 004, same document,
4 please. Take a look at the bottom two chats, please.

5 A. (Witness examines document.)

6 Q. So at 8:52 and 27 seconds you wrote (as read):

7 "How does Zeni LT feel about these scenarios? I
8 think we know Todd's thoughts, but we have run into some
9 leaders that don't want their IP cut from the potential
10 biggest base. Not that this is a blocker but a
11 consideration."

12 Do you see that?

13 A. I do.

14 Q. And "Todd" there is referring to Todd Howard, the head of
15 Bethesda?

16 A. That's right.

17 Q. And the "potential biggest base" is referring to the
18 PlayStation?

19 A. Yes. They're the biggest base.

20 Q. Okay. And so you're asking in this chat, you're saying:
21 Let's figure out what the ZeniMax leadership team thinks about
22 these scenarios; right?

23 A. That's what I'm saying, yeah.

24 Q. And you're saying some folks might be on board, but you
25 have run into some leaders at ZeniMax who don't want their

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1 games, their IP cut from Sony; right?

2 A. That's right.

3 Q. But your comment on that is their feelings about that are
4 not a blocker but they are a consideration?

5 A. Yes, we should consider those that are making the games in
6 the decision that makes -- again, Phil makes the final call,
7 but he weighs many considerations for that.

8 Q. Okay. And then Mr. Booty writes to you at Tim Stuart, the
9 next e-mail -- the message down (as read):

10 "The meetings we have scheduled with Phil and plan to
11 have been with Robert are meant to start this discussion."

12 And "Robert" refers to the former head of ZeniMax who
13 passed away; right?

14 A. That's correct.

15 Q. And Mr. Booty says (as read):

16 "We have avoided talking about it to date to avoid
17 gun-jumping issues."

18 So do you have an understanding of what "gun-jumping
19 issues" means?

20 A. Yes.

21 Q. And that means that even though the deal is announced,
22 Microsoft executives aren't going to be talking to ZeniMax
23 executives about plans for ZeniMax content yet; right?

24 A. Depending on timing, yes. Until the deal closes, we are
25 not able to make changes to road map or business.

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1 Q. Okay. And so you can't talk to the Zeni executives, or
2 Mr. Booty is saying "Let's be careful. Let's not talk to the
3 ZeniMax executives yet, but we've got the meetings on the books
4 for when it's appropriate to talk to them." Is that your
5 understanding of that?

6 A. Yeah. It appears Matt says "We have a meeting scheduled
7 with Phil."

8 Q. And you are not -- this chat is not with the ZeniMax
9 people. This is an internal Microsoft chat planning for the
10 ZeniMax meetings and what to do with ZeniMax; right?

11 A. I believe that's right. I don't believe I saw any ZeniMax
12 people on the invite.

13 Q. I want you to look at -- please turn to page 006, please.
14 It's another message from you. It's the second one from the
15 top.

16 Ms. Bond has an enthusiastic reaction to something. She
17 says "Yes," and then you write at 9:01 and 47 seconds (as
18 read):

19 "Minecraft being on all platforms enabled its mass,
20 mass, mass market in my opinion, but" --

21 (Official Reporter clarification.)

22 **BY MR. WEINGARTEN:**

23 Q. Your chat, Mr. Stuart, was, your message (as read):

24 "Minecraft being on all platforms enables its mass,
25 mass, mass market in my opinion, but that's the Minecraft

1 world. I think it's different for these games."

2 Right?

3 A. Correct.

4 Q. And "these games" there means the ZeniMax titles; right?

5 A. That's right.

6 Q. And just to pull us back to where we started, you're
7 talking here about -- with the Gaming Leadership Team members
8 and senior executives about changes to ZeniMax's existing
9 multiplatform business; right?

10 A. I don't believe it's about existing. It looks like it's
11 about future titles.

12 Q. Okay. So you're talking about changes to what had been
13 projected in the deal model for future titles; right?

14 A. If there's decisions that come out of this that impact the
15 deal model, that's correct.

16 Q. And the deal model assumed that, while ZeniMax is
17 generally multiplatform, it's going to be multiplatform; right?

18 A. The deal model assumed existing business goes forward.

19 Q. And if existing business was multiplatform, it will go
20 forward multiplatform; right?

21 A. Yeah, that's right.

22 Q. Okay. Now, these chats we're looking at, this is
23 February 9th, 2021. Let's take a look please at PX1116.

24 MR. WEINGARTEN: Oh, I'm sorry. And can we please
25 move to admit PX1966.

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1 **THE COURT:** Admitted.

2 (Trial Exhibit 1966 received in evidence.)

3 **BY MR. WEINGARTEN:**

4 **Q.** Now, let's look at PX1116.

5 **A.** Yes.

6 **Q.** Okay. This is two weeks later; right? The chat was
7 February 9th, 2021, and now we're looking at an e-mail from
8 February 23rd, 2021; right?

9 **A.** That's right.

10 **Q.** And it's an e-mail from you to Ms. Lawver and someone
11 named Kelly Huschka, H-U-S-C-H-K-A?

12 **A.** Kelsey, that's right.

13 **Q.** Oh, I'm sorry. Kelsey. My apologies.

14 **MR. WEINGARTEN:** Please move to admit PX1116.

15 **THE COURT:** Admitted.

16 (Trial Exhibit 1116 received in evidence.)

17 **MR. GOSTAN:** This is marked confidential.

18 **MR. WEINGARTEN:** I have numbers. The numbers are the
19 problem; right? Or is the whole thing?

20 **MR. GOSTAN:** I think we have the whole thing marked as
21 confidential.

22 **MR. WEINGARTEN:** Okay. Okay. Thank you for the
23 reminder.

24 Okay. I will try to talk around it.

25 \\

1 BY MR. WEINGARTEN:

2 Q. Go to -- go to the second page of this e-mail chain,
3 please. And do you see the bottom e-mail that starts off this
4 chain is from Mr. West?

5 A. Yes.

6 Q. And you're not on it, but the sentiment is expressed that
7 this was an excellent session. Do you see that?

8 A. I do.

9 Q. Do you understand that to be a reference to at least part
10 of the session, the chat that we were looking at, whatever
11 meeting that was?

12 A. I'm not sure if it's directly related to that, but I think
13 we could assume that.

14 Q. Okay. Mr. Booty says "Great work"; right?

15 A. That's right.

16 Q. And then you get added by a Mr. Murphy at the top e-mail
17 on page 2, and he's asking you -- he's telling you, he says (as
18 read):

19 "I added Tim to the thread because I want to recap
20 what I heard as the next steps."

21 Do you see that?

22 A. Yes.

23 Q. Okay. And those next steps involve working with finance
24 to do some things; right?

25 A. That's right.

1 Q. So look at the first bullet, work with finance to do those
2 things; right?

3 A. Yes.

4 Q. Okay. And he wants to work with finance to expand a
5 timeline on the next bullet; right?

6 A. That's right.

7 Q. And he wants to understand the next step is providing more
8 clarity around an impact to something. Do you see that third
9 bullet?

10 A. That's right.

11 Q. Okay. So then at the bottom of his e-mail he asks you (as
12 read):

13 "Well, in the past I've worked with Kelsey and Jamie
14 L on this. Does that work?"

15 So he's asking your permission there to reach out to
16 Ms. Huschka and Ms. Lawver; right?

17 A. That's right.

18 Q. Okay. And if you go back to page 1, Mr. West confirms he
19 thinks Mr. Murphy got the right idea. He says "Those were the
20 top lines for me"; right?

21 A. Yeah, that's right.

22 Q. He says there was a small thread of discussion on option
23 four as a hybrid, and he explains what option four could be;
24 right?

25 A. That's right.

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1 **MR. WEINGARTEN:** Can I read that one, Karen, "Taking
2 all"?

3 **MR. GOSTAN:** Yeah.

4 **BY MR. WEINGARTEN:**

5 **Q.** Okay. So Mr. West says (as read):

6 "Well, option four we discussed a little bit was
7 taking all the new IP exclusive and delaying porting to
8 the PS version for established IP linear games like a
9 Fallout."

10 Do you see that?

11 **A.** Yes.

12 **Q.** Okay. And then you write back (as read):

13 "Adding Jamie and Kelsey to run through the model" --
14 strike that.

15 Let me be very clear about that one. (as read):

16 "Adding Jamie and Kelsey to run this through the
17 acquisition model."

18 So did you understand that there that you were adding
19 Ms. Lawver and Ms. Huschka because they were going to help work
20 on taking these scenarios and using the ZeniMax deal model as a
21 base to sort of run the scenarios and see what happens to the
22 valuation?

23 **A.** That's right. We have to start with our baseline
24 commitment.

25 **Q.** So you start with the baseline model, alter it based on

1 the conversations about the scenarios here for exclusivity, and
2 see what happens; right?

3 **A.** Yeah. I'd say it's a scenario analysis from the baseline
4 model.

5 **Q.** Okay. And you write (as read):

6 "What we will need to prove out over the ten-year
7 life of the model..."

8 And you list some items there about what's going to
9 change; right? There's a decrease -- do you see that? -- in
10 something?

11 **A.** That's right.

12 **Q.** And then there's an increase in Game Pass. Do you see
13 that?

14 **A.** That's right.

15 **Q.** And then there's going to be some margin impact, and you
16 write "Need to ensure we keep the model at," and there's that
17 number, don't say it; right?

18 **A.** Correct.

19 **Q.** Now, Ms. Lawver writes back to you on the 23rd. She says
20 (as read):

21 "Kelsey has run the numbers. Looks like we drop well
22 below blank but we're still reviewing."

23 Right?

24 **A.** That's right.

25 **Q.** That number there that we're not reading, that's your

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1 understanding of the commitment; right?

2 A. Correct.

3 Q. From the ZeniMax model?

4 A. Correct.

5 Q. And so she says (as read):

6 "Once Kelsey and I have reviewed, do you want me to
7 find time to meet to discuss or would you prefer to handle
8 via e-mail?"

9 And you write back (as read):

10 "If it's material, yes, we should meet up to review."

11 And you offer to read through some things ahead of time;
12 right?

13 A. That's correct.

14 Q. And so the idea is they've run the scenario and there's a
15 material drop from the commitment; right? Well, at least a
16 drop from the commitment?

17 A. In this scenario analysis, it looks like they drop below
18 that commitment, yeah.

19 Q. And so there's going to have to be some work done to
20 figure out ways that if that scenario is the scenario, to get
21 back to the commitment; right?

22 A. That's right. We always have to land the commitment to
23 the company.

24 Q. And you believe -- and you believed at this time that
25 gaming could plan and work hard and be creative and figure out

1 ways to fill the gap to the commitment; right?

2 **A.** In my job we run lots of scenarios, what it would take to
3 believe to fill gaps, that's right.

4 **Q.** And ultimately the decision on whether to make a decision
5 that might bring the business below the commitment and a
6 decision about how to fill to get back to the commitment,
7 that's Mr. Spencer's decision; right?

8 **A.** It's ultimately his call and the decision to make title
9 recommendations or changes.

10 **Q.** Okay. And do you recall that you discussed at the Gaming
11 Leadership Team this gap that this scenario could create to the
12 number we're not allowed to say; right?

13 **A.** Yeah. I mean, in my prior chat, we talked about keeping
14 that in mind as the core commitment.

15 **Q.** Right. And Starfield is planned to launch as an
16 exclusive; right?

17 **A.** That's correct.

18 **Q.** Starfield is a ZeniMax game; right?

19 **A.** Yes.

20 **Q.** But despite launching Starfield as an exclusive, you
21 believe that Microsoft Gaming can still meet its commitment to
22 the board that was set in the final ZeniMax model; right?

23 **A.** Yeah. The type of game that Starfield is gives me that
24 confidence, that's right.

25 **Q.** And part of that is because the model is a ten-year model

1 and you have time to create some value over the ten years to
2 help get back to the number from the model; right?

3 **A.** It's a true statement. Changes we make to the model early
4 in a discounted cash flow are always more meaningful; but,
5 correct, we owe the total valuation of the model.

6 **Q.** Right. Because the valuation the board is told is a
7 ten-year plan?

8 **A.** Plus terminal value, that's right.

9 **Q.** I'm sorry, sir. Go ahead.

10 **A.** It's ten-year plus terminal value so it has existing value
11 past the life of the asset such as brand and IP.

12 **Q.** Now, we've talked a little bit about some conversations
13 about making up this gap, but you don't remember specifically
14 discussing any of this modeling or the gap with Mr. Spencer;
15 right?

16 **A.** Not specifically, no.

17 **Q.** Okay. And, again, we discussed this. Part of your role,
18 and it's a fiduciary responsibility I think you said in the
19 past, is to remind Mr. Spencer about the commitments to the
20 board but he owns the decision; right?

21 **A.** That's correct, and I don't need to remind him of the
22 commitment nor the number.

23 **Q.** Understood.

24 And whatever decision-making process Mr. Spencer employs,
25 that's his process for making these kinds of decisions after he

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1 gets all the inputs from you about the commitment and the
2 planning, et cetera; right?

3 **A.** Yes. He weighs all the factors of consumers and GLT
4 opinion and various other elements.

5 **Q.** And you don't recall any conversations with Mr. Spencer
6 about taking titles exclusive from ZeniMax; right?

7 **A.** I don't recall any specifically.

8 **Q.** Let's take a look at some of the timing around maybe those
9 decisions. So please turn in your binder to PX4308.

10 **MR. WEINGARTEN:** I apologize if I did not move to
11 admit PX1116. I would move to admit it.

12 **THE COURT:** You did.

13 **MR. WEINGARTEN:** Oh, very good. Thank you,
14 Your Honor.

15 **THE COURT:** Do you want to admit 4308?

16 **MR. WEINGARTEN:** Yes, please.

17 **THE COURT:** Admitted.

18 (Trial Exhibit 4308 received in evidence.)

19 **MR. WEINGARTEN:** Thank you.

20 **THE WITNESS:** So we're at 14308?

21 **BY MR. WEINGARTEN:**

22 **Q.** 4308.

23 **A.** Okay. Thank you.

24 **Q.** Thank you, sir.

25 Let me ask you this question, sir: Do you remember that

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1 there was a -- before you look at the document, do you remember
2 that there were periodic MBR meetings between ZeniMax and Xbox?

3 **A.** That's right.

4 **Q.** Okay. And what does MBR mean?

5 **A.** Monthly business review.

6 **Q.** Okay. And I recognize you're not on this e-mail, but do
7 you recall that there were regular MBR meetings between ZeniMax
8 and Xbox in 2021?

9 **A.** That's likely. I'm not in all of them, but I would assume
10 so.

11 **Q.** Okay. And do you remember that in November of 2021, the
12 Gaming Leadership Team or members from the leadership team
13 talked to ZeniMax leadership about the exclusivity of future
14 ZeniMax titles?

15 **A.** That's correct.

16 **Q.** And you don't remember a specific meeting, but you do
17 remember that Mr. Spencer did talk about some exclusivity
18 guidance to the ZeniMax folks; right?

19 **A.** I believe at the time he gave some guidance in MBR, that's
20 right.

21 **Q.** You don't remember the specifics of what Mr. Spencer
22 guided anyone about; right?

23 **A.** I don't recall that I was in the meeting. I may have been
24 watching chat. So I don't recall the specifics of what the
25 words were.

1 Q. Okay. So to the extent there's an agenda and there was a
2 meeting about Phil's top of mind and it included guidance on
3 exclusivity of future titles, you do remember that there was
4 that kind of a meeting with Mr. Spencer, gaming leadership
5 folks, ZeniMax folks to talk about that; right?

6 A. I assume they had a meeting. I'm not on this mail and I
7 don't know that I was in the meeting.

8 Q. But you do remember that in November of 2021, gaming
9 leadership did talk to ZeniMax leadership about exclusivity;
10 right?

11 A. Yes.

12 Q. Yeah. Let's take a look, please, at PX4334.

13 A. (Witness examines document.)

14 Q. This is another chat transcript. This is between you and
15 Ms. Jamie Lawver; right?

16 A. That's right.

17 Q. And this one is dated around the same time. We're still
18 in November of 2021; right?

19 A. Correct.

20 MR. WEINGARTEN: Move to admit PX4334, please.

21 THE COURT: Admitted.

22 (Trial Exhibit 4334 received in evidence.)

23 BY MR. WEINGARTEN:

24 Q. Now, the chat starts off and you say (as read):

25 "Did we make an official decision on something going

1 exclusive?"

2 That's your question to Ms. Lawver; right?

3 **A.** That's correct.

4 **Q.** She says in response (as read):

5 "Not that I'm aware of. I thought that they" -- "I
6 thought they were going to talk about..."

7 And then she has a title there; right?

8 **A.** That's right.

9 **Q.** Let's not say the name of the title.

10 And you write (as read):

11 "They must have made the call."

12 Now, by "made the call," that means you were asking
13 Ms. Lawver about whether Mr. Spencer made a decision about
14 ZeniMax going exclusive; right?

15 **A.** I was asking about specific titles, that's right.

16 **Q.** So you were asking about whether Mr. Spencer had made a
17 decision about ZeniMax titles going exclusive; right?

18 **A.** Correct.

19 **Q.** And Ms. Lawver says (as read):

20 "I sent Jill a note."

21 Do you understand that to be Jill Braff?

22 **A.** That's right.

23 **Q.** And she was in charge of leading the project to integrate
24 ZeniMax and Microsoft Gaming; right?

25 **A.** That's correct.

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1 Q. Now, Ms. Lawver writes back (as read):

2 "Per Jill, Phil did... to Jamie."

3 Jamie is Jamie Leder?

4 A. Yes.

5 Q. Jamie Leder is the head of ZeniMax at this time?

6 A. Correct.

7 Q. She writes (as read):

8 "Per Jill, Phil did... to Jamie but it wasn't widely
9 known so we wanted to talk about it here to clarify."

10 And you ask (as read):

11 "All games going forward?"

12 And she writes back (as read):

13 "Yes."

14 And you ask to clarify it again (as read):

15 "Not just new IP but All" -- all caps, A-L-L -- "ALL
16 games going forward? Wow."

17 And Ms. Lawver writes (as read):

18 "Yes."

19 Do you see that?

20 A. I do.

21 Q. And you wrote "Wow" because that would be a very big
22 decision that was being communicated to you that Mr. Spencer
23 had made; right?

24 A. I suppose so.

25 Q. And then you note further down, you keep talking about

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1 some more titles. And look at -- look at the timestamp that is
2 21:36. One, two, three, four, five, six chats up from the
3 bottom. It starts with "I'm putting a few." Do you see that?

4 **A.** I do.

5 **Q.** So you write to Ms. Lawver (as read):

6 "I'm putting a few of these things in chat just to
7 make sure they don't get too fixated on a specific number.
8 We will have AM issues in the deal model as we pull a huge
9 amount of PS units out of the model."

10 Do you see that?

11 **A.** I do.

12 **Q.** "PS" means PlayStation?

13 **A.** That's right.

14 **Q.** "AM" means accountability margin or profit?

15 **A.** That's right.

16 **Q.** And the "deal model" is the ZeniMax deal model; right?

17 **A.** The board commitment, yes.

18 **Q.** The board commitment.

19 So if this decision that's being communicated to you goes
20 through, your understanding is that that will create profit
21 issues in the board commitments because it entails pulling a
22 huge amount of PlayStation units out of the model; right?

23 **A.** Yes. Anytime you make a change to a model, you have to
24 have an offset somewhere.

25 **Q.** Okay. And then let's look, please, at PX4375. Same day,

1 same time almost. PX4375.

2 A. (Witness examines document.) Yes.

3 Q. Okay. This is another chat, and now this one is you to
4 Mr. Matt Booty; right?

5 A. That's right.

6 Q. Same day, November 10, 2021; right?

7 A. Correct.

8 Q. Right about the same time 21:00 and 12 hours?

9 A. Yes.

10 Q. Okay. You write to Mr. Booty to start the chat (as read):

11 "Did we make an official decision on something going
12 exclusive?"

13 Do you see that?

14 A. Yes.

15 Q. This is basically at the same time you're chatting with
16 Ms. Lawver; right?

17 A. That's right.

18 Q. You're trying to understand what's going on; right?

19 A. Correct.

20 Q. Mr. Booty writes back (as read):

21 "Phil told them all titles going forward Xbox
22 exclusive."

23 And then a few conversations about Steam and an e-mail,
24 and then you write (as read):

25 "This is new IP I assume, not ALL games."

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1 And then you put "all" in caps again; right?

2 **A.** That's right.

3 **Q.** And Mr. Booty says (as read):

4 "Nope. All games."

5 And Mr. Booty says (as read):

6 "I wasn't in any of the discussions or on the
7 e-mails."

8 And you write (as read):

9 "Hmm, okay. Thanks."

10 And Mr. Booty writes (as read):

11 "As I was saying, different from the deal model."

12 Do you see that?

13 **A.** I do.

14 **Q.** So Mr. Booty is confirming that he thinks Mr. Spencer has
15 made a big decision about all the ZeniMax titles; right?

16 **A.** Yeah. There's a few people saying they heard certain
17 things. We've obviously, since the meeting, gone back and
18 clarified with Jill and Phil what the actual decision is. So
19 this is me trying to understand what was discussed in this MBR.

20 **Q.** Okay. And Mr. Booty writes to you (as read):

21 "Has there been any official word on Redfall?"

22 And you write (as read):

23 "Phil hints to me that it's, quote/unquote, official,
24 but I haven't heard anything from them. We need to have
25 that."

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1 Do you see that?

2 **A.** I do.

3 **Q.** And that's -- when you say it's "quote/unquote, official,"
4 that's because if Mr. Spencer decides it's official even if it
5 hasn't gone out yet in a, quote/unquote, official manner;
6 right?

7 **A.** I assume when Phil makes the call, that's the call and
8 there's various ways to communicate.

9 **Q.** Okay. You can put that aside, please, sir.

10 **MR. WEINGARTEN:** I think I need to move to admit
11 PX4375.

12 **THE COURT:** Yes, admitted.

13 (Trial Exhibit 4375 received in evidence.)

14 **MR. WEINGARTEN:** Thank you.

15 **BY MR. WEINGARTEN:**

16 **Q.** Let's talk a little bit about the Denali model. We've
17 talked about ZeniMax. Let's talk about Denali.

18 The Denali model includes some assumptions about platform
19 mix for Activision games; right?

20 **A.** It does.

21 **Q.** Platform mix, it's got assumptions about the revenue mix
22 for Activision from having games played on different consoles;
23 right?

24 **A.** Yeah. It includes mobile, PC, Nintendo, PlayStation.

25 **Q.** So if X percent of Activision revenues come from playing

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1 on -- playing Activision games on Xbox, the model says, great,
2 that's the X percent of Activision revenues that will play on
3 Xbox going forward; right?

4 **A.** In the model, yes, we make assumptions about platform mix.

5 **Q.** And if the model -- well, if Activision gets Y percent of
6 its revenues from having Activision games played on

7 PlayStation, the model assumes, okay, that Y percent to play
8 from PlayStation platform is going to carry forward; right?

9 **A.** The model makes assumptions about platform mix, and we
10 keep an existing business line that reflects that going
11 forward.

12 **Q.** Right. So the share -- the mix of Activision revenues
13 between Xbox and PlayStation, the model holds that, whatever it
14 is, for the existing business and carries it forward?

15 **A.** Yes, among other things. Models have many assumptions
16 that go into them.

17 **Q.** Sure. Sure.

18 And the model, I think we've heard, does not model any
19 changes in console share as a result of Microsoft's Activision
20 acquisition; right?

21 **A.** That's correct.

22 **Q.** And because we buy it, our share of the console market is
23 going to jump up or go down or whatever; right?

24 **A.** That's correct, no change.

25 **Q.** Okay. Now I'd like to introduce PX4341, please. If you

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1 can turn in your binder to PX4341.

2 **A.** (Witness examines document.) Yes, I'm here.

3 **Q.** Okay. The cover e-mail is less exciting, but read it if
4 you need to, but PX4341-005, that's a copy of the Activision
5 Blizzard presentation that went to Microsoft's Board of
6 Directors on January 16th, 2022; right?

7 **A.** That's correct.

8 **Q.** This is one of the final, if not the final, board
9 presentations about this deal; right?

10 **A.** That's right.

11 **Q.** Let's just take -- I want you to hold in mind what we were
12 talking about with revenue shares, but let's just take a quick
13 look through some of the document if we could, please.

14 Can you, please, turn to page 024 of PX4341? Do you see
15 that?

16 **A.** Yes.

17 **Q.** And that's a slide titled "Activision Blizzard Value
18 Drivers." Do you see that?

19 **A.** I do.

20 **Q.** Okay. And you're telling the board here, no change to the
21 framework since your last review; but for our purposes, this is
22 a description to the board of what drives the valuation that
23 the model computes for Activision; right?

24 **A.** That's correct.

25 **Q.** The valuation has an existing business component and then

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1 it has a net synergies component; right?

2 A. Correct.

3 Q. The net synergies component has three subcomponents about
4 accelerating Game Pass, about extending the Xbox store into a
5 universal store, and some expansion of a Microsoft advertising
6 network; right?

7 A. That's right.

8 Q. And then at the bottom it says "Other" -- let me ask you
9 this: And the existing business and the net synergies, those
10 got modeled and calculated; right?

11 A. Correct.

12 Q. And if you look at the next page, 025, that's the
13 calculations for those; right?

14 A. Yes.

15 Q. The categories line up existing, Game Pass, universal
16 store, advertising; right?

17 A. That's right.

18 Q. Now, back on the 024, at the bottom there's a little box
19 that says "Other Strategic Benefits," and that one says "Xbox
20 Console Ecosystem"; right?

21 A. That's right.

22 Q. And the strategic benefit to the console -- the Xbox
23 console ecosystem does include a shift among console revenue
24 mix; right?

25 A. We didn't model any of those activities if that was one.

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1 It could also be brand, customer enjoyments, many things that
2 go into the ecosystem, safety, security.

3 Q. You didn't model it, but when you're telling the board and
4 the board is told that another strategic benefit is the Xbox
5 console ecosystem, that includes a shift among console revenues
6 for Activision; right?

7 A. We didn't lay it out specifically to the board, no.

8 Q. So let's take a look in your deposition, please, at
9 page 93. I think that's PX7040, deposition page 93.

10 A. Just a second.

11 Q. Sorry. I know it's a big binder.

12 A. (Witness examines document.) Okay. I'm here.

13 Q. So look on page 93 of the transcript at page 17 --
14 line 17, please (as read):

15 "QUESTION: Does a strategic benefit to the Xbox console
16 ecosystem include any shift among console revenue mix?

17 "ANSWER: By definition that is the console ecosystem. So
18 I'm going to agree with your definition that that could be
19 one example."

20 Do you see that.

21 A. I do.

22 Q. That testimony was truthful and accurate when you gave it;
23 right?

24 A. Correct.

25 Q. And I also asked you (as read):

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1 **"QUESTION:** Does the strategic benefit of the deal to the
2 Xbox" -- it says "conceal" but I think we can agree it
3 means "console" -- "ecosystem include a shift in the mix
4 in terms of how many Xbox consoles are sold versus
5 non-Xbox consoles sold?

6 **"ANSWER:** If you're asking about the console ecosystem,
7 there's a lot of things that go into that. The console
8 ecosystem includes share. In the model, we don't include
9 any assumptions around shift. But if you're asking about
10 the Xbox console ecosystem and what is included in that,
11 it's share, yes."

12 That testimony was truthful and accurate; right?

13 **A.** That's right.

14 **Q.** Okay. Now, let's take a look at the actual numbers that
15 were modeled. I understand the console piece was not, but
16 let's look at this next page, PX4341-025.

17 **A.** (Witness examines document.) Okay. I'm here.

18 **Q.** That page discuss -- calculates all the values to
19 Microsoft that you modeled for the deal; right?

20 **A.** That's correct.

21 **Q.** Please do not say any of these numbers out loud, but the
22 first row is, again, that existing business row; right?

23 **A.** Right.

24 **Q.** And that is the continued sale of Activision Blizzard
25 portfolio on all the platforms: Console, PC, mobile; right?

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1 A. Correct.

2 Q. And there's a value; right?

3 A. That's right.

4 Q. And that's half or so of the total value?

5 A. Yes.

6 Q. Okay. The next one is the Game Pass. Well, the next
7 three are the synergies; right? Game Pass, store, advertising;
8 right?

9 A. That's right.

10 Q. And they make up the other half of the value to Microsoft;
11 right?

12 A. Correct.

13 Q. And Game Pass is that number on the far right in the
14 second row; right?

15 A. That's right.

16 Q. And that number -- I'm trying to do this -- well, that is
17 a majority or more of the total synergy number; right?

18 A. Yes, that's fair.

19 Q. But if you add up all this, there's two pieces. There's
20 existing business and there's synergies; right?

21 A. That's right.

22 Q. And if you look at the synergies piece, the Game Pass
23 piece is a big majority of it; right?

24 A. Within the synergies --

25 Q. I'm sorry.

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1 **A.** -- right.

2 **Q.** And within the synergies, the mobile store and the margin
3 and even if we throw in the PC store, that's a much smaller
4 piece of the synergies; right?

5 **A.** As a percentage, yeah.

6 **Q.** If we were just focusing on mobile synergies, we would
7 look at mobile store and maybe some of that margin piece;
8 right?

9 **A.** That's right. Just a reminder, it doesn't include the
10 mobile -- part of their business in the existing business line.

11 **Q.** Right. That's the existing business. But the synergies
12 are about what new value is created from having these two
13 companies come together; right?

14 **A.** That's correct.

15 **Q.** And so a synergy is something that didn't exist before as
16 a value that thanks to these two companies coming together,
17 that's the new value that's created; right?

18 **A.** Yeah, that's right.

19 **Q.** Okay. And so if we look at the mobile value, it's -- one
20 two, three -- the fourth and the fifth rows on that table;
21 right?

22 **A.** That's right.

23 **Q.** Okay. And if you add those up, that is a relatively small
24 percentage compared to Game Pass of the total synergies; right?

25 **A.** I would say it's a very large number but a small

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1 percentage relative to Game Pass.

2 Q. Right. So the driver of the synergies is Game Pass;
3 right?

4 A. The majority of synergies is Game Pass.

5 Q. More than -- more than two-thirds; right?

6 A. That's fair.

7 Q. Now, I understand from your previous testimony these
8 values are commitments to the board; right?

9 A. The lower right-hand number is the commitment to the
10 board.

11 Q. Okay. So the very bottom lower right-hand number is the
12 commitment.

13 And how the gaming business operates within this framework
14 is a decision of the gaming business; correct?

15 A. Knowing that things change over time, that's correct.

16 Q. Okay. And so the commitment is that -- that big number on
17 the bottom right; but with any acquisition, things can change,
18 strategies change, and your job is to help make sure they hit
19 that commitment even if all the details inside of it move
20 around; right?

21 A. Yeah, but I wouldn't be so loose with that. Any
22 acquisition is inherently risky, but fundamentally that's the
23 number we're committed to.

24 THE COURT: Should we take a morning break or do you
25 want to finish?

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1 **MR. WEINGARTEN:** I have not much longer, but maybe a
2 break, Your Honor.

3 **THE COURT:** Okay. All right. Why don't we take our
4 15-minute morning break.

5 **MR. WEINGARTEN:** Thank you.

6 (Recess taken at 10:04 a.m.)

7 (Proceedings resumed at 10:20 a.m.)

8 **THE CLERK:** Court is in session.

9 **THE COURT:** All right. We are resuming the testimony
10 of Mr. Stuart.

11 **MR. WEINGARTEN:** Thank you.

12 Lest I forget, move to admit, please, PX4341.

13 **THE COURT:** Admitted.

14 (Trial Exhibit 4341 received in evidence.)

15 **MR. WEINGARTEN:** Thank you, Your Honor.

16 **BY MR. WEINGARTEN:**

17 **Q.** We're looking at, sir, PX4341 and we're on page 025;
18 right?

19 **A.** Correct.

20 **Q.** Okay. We've been talking about the value to Microsoft
21 that the deal model calculated; right?

22 **A.** That's correct.

23 **Q.** Just a couple of quick questions to fill in some of these
24 synergies.

25 Now, the Game Pass synergy is described as accelerating

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1 Game Pass subscriptions across console and PC; right?

2 A. That's correct.

3 Q. And the drivers of that acceleration are bringing
4 Activision content into Game Pass which pushes on certain
5 assumptions about users and engagement and hours, and that
6 drives the synergy?

7 A. Correct.

8 Q. Okay. And the content that's put into the model to talk
9 about accelerating Game Pass, you and your team divide up the
10 Activision content into different tiers?

11 A. That's right.

12 Q. And so you categorize the content tier 1, tier 2, tier 3;
13 right?

14 A. That's right.

15 Q. And the tier 1 content is the kind of content that you and
16 your team estimate will generate the most hours of engagement
17 on Game Pass; is that fair?

18 A. That's right.

19 Q. And then if it generates the most hours, that will
20 generate revenues and profits and the synergy; right?

21 A. That's right. Hours played is highly correlated to
22 overall subscribers.

23 Q. So you and your team divide up the future -- strike
24 that -- you divide up the titles and you categorize them by
25 tiers; right.

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1 A. That's right.

2 Q. Call of Duty is a tier 1 title in that model?

3 A. That's right.

4 Q. Is that the highest tier?

5 A. I believe so.

6 Q. Okay. If there were a tier 1 plus, Call of Duty would be
7 in it; right?

8 A. Yes.

9 Q. Okay. And when you talk about accelerating Game Pass,
10 that includes all the tiers of Game Pass?

11 A. That's right.

12 Q. So it includes Game Pass Ultimate, the cloud component, as
13 well?

14 A. It includes Game Pass Ultimate, which includes PC and
15 console and access to cloud.

16 Q. Okay. Now, the mobile store synergy that we talked about,
17 that's the -- one, two, he three -- fourth row. And the bold
18 number is the fourth one down there; right?

19 A. That's correct.

20 Q. That one says (as read):

21 "By building upon Activision Blizzard player
22 engagement to provide the foundation needed to scale our
23 Xbox store to mobile."

24 Now, does that calculation include an assumption about
25 breaking or getting past the Apple and Google app store

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1 duopoly?

2 **A.** It assumes we're able to monetize a store on IOS and
3 Android.

4 **Q.** Okay. And there's certainly no guarantee that will
5 happen; right?

6 **A.** I would say there's no guarantee.

7 **Q.** Yeah. And so the synergy there assumes that somehow
8 through regulation or through contractor something the Xbox
9 store is able to join the Apple store and the Google Play store
10 on the iPhone and the Android; right?

11 **A.** It's important to note that what you're referencing is
12 called direct transactions through the store. There's
13 scenarios where entitlements are purchased outside of IOS and
14 Android and we can access mobile content through our app.

15 **Q.** So to the extent some of this may depend on make breaking
16 the duopoly, some of it may not, this number?

17 **A.** This model didn't explicitly call that out. It's a
18 scenario; but in the end, it's about entitlements and where
19 they're played.

20 **Q.** Okay. I want to talk to you some more about this idea of
21 shifting Activision revenues.

22 Now, on January 15th, 2022 -- that's just a few days
23 before the deal announcement; right?

24 **A.** Yes.

25 **Q.** That's a day or so before the final Microsoft Board

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1 meeting; right?

2 A. I believe that's right.

3 Q. There was a meeting on January 15th, 2022, to prepare for
4 the final board discussion? Yes?

5 A. That seems likely.

6 Q. And Mr. Nadella attended that review?

7 A. I don't know of a specific review.

8 Q. Can you please turn -- do you think it would help you to
9 remember if we looked at some prior testimony?

10 A. Yes.

11 Q. Okay. Let's please look at your deposition, page 201.

12 A. 7040-201?

13 Q. Yes, sir. The little numbers for the transcript page 201.
14 It's really page 200 to 201.

15 A. Okay.

16 (Witness examines document.) Okay. I'm on 201.

17 Q. Okay. And take a look, read to yourself page 200, you
18 know, line 12, through 201:10 -- 201:17. Just take a look
19 there. Let me know when you've had a chance.

20 A. (Witness examines document.) Yes, I see it.

21 Q. So having looked at that, does that refresh your
22 recollection about a January 15th meeting?

23 A. I'm not doubting that there was a meeting. I don't see
24 that it's January 15th and those -- but I don't doubt that a
25 meeting occurred.

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1 Q. Okay. Well, let's -- let's do it this way: Do you recall
2 that there was a meeting in early January to do final prep for
3 the board presentation; right?

4 A. I have no reason to doubt that. I'm just not recalling a
5 specific meeting back then.

6 Q. And you do recall that coming out of that meeting, there
7 was an ask for some analysis related to Activision revenues;
8 right?

9 A. Yes.

10 Q. Okay. And the particular ask for you and your team was to
11 do an outline of what would happen if there were a change in
12 the revenues that Activision earns on Sony; right?

13 A. Correct.

14 Q. So I'm not going to read the numbers out loud, but if you
15 look at page 200 of the transcript, lines 12 to 16, do you see
16 the change that's discussed in those lines there?

17 A. I do.

18 Q. And yes or no, that is the change that you were asked to
19 investigate and model; right?

20 A. I believe that's right, yes.

21 Q. Okay. And so you were asked to take a look at and model
22 what would it mean if the revenue that Activision titles earned
23 on Sony PlayStation's declined in that way; right?

24 A. I believe that's right, yes.

25 Q. Okay. And that presents a type of revenue risk to the

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1 model; right?

2 A. That's correct.

3 Q. And it's a revenue risk because if Activision's share of
4 money it gets from games played on PlayStation goes down, all
5 else equal, Activision revenues go down?

6 A. All else equal, that's right.

7 Q. Okay. And so this exercise that you were asked to do was
8 about assuming Activision revenues from PlayStation decrease?
9 Yes?

10 A. I believe it was an ask on a scenario to be prepared for
11 an eventuality if we had a question from the board.

12 Q. Okay. So you were wondering if some -- let me start over.
13 So the idea was the board might be interested in knowing
14 what would happen if revenue on Sony that Activision earns went
15 down, and the goal was let's outline and prepare and see the
16 answer; right?

17 A. Yes, among other things. We want to be prepared when we
18 go talk to the board about questions they may ask.

19 Q. Okay. And this work to investigate what happens if
20 Activision's revenues on Sony decrease, that's not part of the
21 Denali model; right?

22 A. Correct. This was an ask for a prep for the board.

23 Q. So outside of the model process, there was a separate ask
24 and a separate modeling process to look at what would happen if
25 Activision revenue on Sony went down?

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1 **A.** I see the ask. I don't recall the model output from that;
2 but, yes, that's correct.

3 **Q.** We'll get there.

4 Could you please open your binder to PX1190?

5 **A.** (Witness examines document.) Yes, I'm here.

6 **Q.** Okay. So this is a chat transcript between you and
7 Ms. Lawver; right?

8 **A.** That's correct.

9 **Q.** It's dated January 15th, 2022; right?

10 **A.** Correct.

11 **MR. WEINGARTEN:** Move to admit PX1190, please.

12 **THE COURT:** Admitted.

13 (Trial Exhibit 1190 received in evidence.)

14 **BY MR. WEINGARTEN:**

15 **Q.** Ms. Lawver starts the chat with something about she will
16 check tonight, and then you inform her about two asks from the
17 Satya/Amy review just now, and you wrote (as read):

18 "Denali has sent over a new forecast based on lower
19 expectations. Will need to put it into our FY and compare
20 against both their prior management forecast and our
21 current final model. Will need a slide for the board
22 review on Sunday."

23 Do you see that ask?

24 **A.** I do.

25 **Q.** That actually relates to something you and I discussed, I

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1 think towards the beginning of the exam, about new numbers that
2 came over from Activision; right?

3 **A.** I believe those are related, yeah.

4 **Q.** Yeah. So then the next ask is, you write to Ms. Lawver
5 (as read):

6 "An outline of what happens" -- don't read these
7 numbers -- "should Sony cancel any of their deals."

8 And then you presume a royalty split with Sony; right?

9 **A.** Correct.

10 **Q.** And then you say (as read):

11 "What happens if that split goes down to another kind
12 of split?"

13 Right?

14 **A.** Yes.

15 **Q.** And you tell Ms. Lawver how much revenue risk that is (as
16 read):

17 "... and how many XGP subs/Xbox mix would we need to
18 make up that gap?"

19 Do you see that?

20 **A.** I do.

21 **Q.** So you're telling Ms. Lawver here about the ask, and the
22 ask is: What happens if revenue that Activision earns on Sony
23 declines; right?

24 **A.** That's right.

25 **Q.** A part -- the other -- so one part of the ask is: Let's

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1 calculate that; right?

2 **A.** Correct.

3 **Q.** That's the risk; right?

4 **A.** This ask here is about the risk here, yes.

5 **Q.** Right. And then the second part of the calculation is:
6 Let's calculate how many Game Pass subs and how much revenue
7 would have to move over to Xbox to make up that gap; is that
8 right?

9 **A.** That's right. I wanted to make sure we kept the variables
10 of the offset within the deal model construct so we didn't
11 introduce other variables.

12 **Q.** Okay. Could you please turn in your binder to PX4319?

13 **A.** (Witness examines document.) Yes, I'm here.

14 **Q.** Okay. This is another chat between you and Ms. Lawver.
15 This one is dated January 14th. So it's a day prior to the one
16 we just looked at; right?

17 **A.** That's right.

18 **MR. WEINGARTEN:** Move to admit PX4319, please.

19 **THE COURT:** Admitted.

20 (Trial Exhibit 4319 received in evidence.)

21 **BY MR. WEINGARTEN:**

22 **Q.** So I apologize for taking it out of order, but one is
23 January 14th, the other is January 15th. But if you look at
24 this chat, this is all about preparing for that revenue mix
25 shift ask; right?

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1 **A.** It's a scenario analysis to go look at the impact of that,
2 that's right.

3 **Q.** Okay. Now you write in the third line down (as read):

4 "How should we think through" -- and you give the
5 split -- "if Call of Duty switches out of their
6 PlayStation deal? Risk to the model?"

7 And Ms. Lawver is trying to get some clarity. She writes
8 (as read):

9 "Meaning not launching or no marketing support?
10 Either one puts risk to the model, but I think we have
11 areas of opportunity not captured for other games."
12 Do you see that?

13 **A.** I do.

14 **Q.** And then you write your assumptions about how the revenues
15 might get risked; right? It might -- the share might change;
16 right?

17 **A.** That's right.

18 **Q.** And Ms. Lawver writes (as read):

19 "Yes, risk to model unless we think there are
20 opportunities to push a larger percentage of customers to
21 other platforms to make up for the delta."

22 Do you see that?

23 **A.** I do.

24 **Q.** And then you pick up on her point about pushing customers
25 to other platforms; right?

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1 **A.** I see that.

2 **Q.** You wrote (as read):

3 "Got it. Do we think I can say that there is margin
4 risk there but it can be offset with shift to Xbox in the
5 overall platform mix?"

6 Do you see that?

7 **A.** I do.

8 **Q.** Okay. And Ms. Lawver writes back (as read):

9 "Yes, I think so. That would be part of our goal
10 anyways I assume."

11 Right?

12 **A.** Yes. This is about revenue mix of Call of Duty, that's
13 right.

14 **Q.** That's right.

15 So the idea is, if you assume that revenues that Call of
16 Duty earns on PlayStation go down, is there a way to make up
17 for that; right?

18 **A.** Yeah. That's our scenario, that's right.

19 **Q.** Okay.

20 **MR. WEINGARTEN:** If I haven't, PX1190, move to admit,
21 please.

22 **THE COURT:** Yes, 4319 is admitted.

23 **MR. WEINGARTEN:** Sorry, no. 1190. I apologize,
24 Your Honor.

25 **THE COURT:** Oh, 11 -- no, that's also admitted.

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1 **MR. WEINGARTEN:** Thank you. Sorry, Your Honor.

2 **BY MR. WEINGARTEN:**

3 **Q.** Okay. Let's take a look at what happened. PX4358,
4 please.

5 **A.** (Witness examines document.)

6 **Q.** This is an e-mail from Ms. Lawver to you, and it includes
7 some folks from the Microsoft corporate development team who
8 were working on the Activision deal; right?

9 **A.** That's correct.

10 **Q.** We're back to January 15th and 4:42 p.m.; right?

11 **A.** That's right.

12 **MR. WEINGARTEN:** Move to admit PX4358, please.

13 **THE COURT:** Admitted.

14 (Trial Exhibit 4358 received in evidence.)

15 **BY MR. WEINGARTEN:**

16 **Q.** Okay. Now, Ms. Lawver did the work; right? She ran the
17 numbers?

18 **A.** Yes.

19 **Q.** Okay. And she created a table that would help show how
20 many incremental subscribers Microsoft would need to get into
21 Game Pass or how much Activision revenue would need to shift to
22 Xbox console to make up for the assumed loss in Activision
23 revenue on Sony; right?

24 **A.** Yeah. This is an Excel goal seek to back into what you
25 need to believe to offset the questions being asked.

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1 Q. Okay. And so Ms. Lawver writes (as read):

2 "This is based on prior board numbers. Essentially
3 we would need either" --

4 MR. WEINGARTEN: Can I read that, Karen, those
5 numbers? The second sentence there, "Essentially we would need
6 either"?

7 MR. GOSTAN: No.

8 MR. WEINGARTEN: Okay. okay.

9 BY MR. WEINGARTEN:

10 Q. "So essentially we would need either," and she gives a
11 number for additional engaged subscribers to Game Pass; right?

12 A. Correct.

13 Q. She gives a range; right?

14 A. Yes.

15 Q. Yes?

16 A. Yes.

17 Q. Okay. Or a platform mix, and she writes "a percentage
18 from Microsoft to a percentage from Microsoft," but she -- do
19 you understand her to mean a percentage from Microsoft to a
20 percentage for Sony -- a percentage from Sony to a percentage
21 to Microsoft?

22 A. This is the baseline model assumption of that number --
23 ah -- of that number to a new number on the Xbox platform.

24 Q. I apologize.

25 So what she's saying in the second part of that sentence

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1 is: To make up for this lost revenue, we can do it if the
2 amount of Activision revenues goes from -- on Microsoft goes
3 from that first number to that second number?

4 **A.** She's not making a claim if we can do it. She's
5 highlighting what Excel reports that as the Goal Seek.

6 **Q.** Right. But mathematically?

7 **A.** Just a math exercise, that's right.

8 **Q.** Right. But she's -- and the point of the math is, if you
9 assume the revenue that we earn off of Sony from Activision
10 goes down, then mathematically we can make it up if the amount
11 of revenue that we earn from Activision on Xbox goes up in this
12 manner?

13 **A.** Yes. I mean, you're saying we can make it up. I would
14 just say we can decrease by one number and then Excel Goal Seek
15 and have an inverse of that number, yes.

16 **Q.** Okay. I mean, the point of the project was for her and
17 you to create scenarios to explain how to make up that
18 declining number of revenue; right?

19 **A.** That was the point of the exercise, right.

20 **Q.** Okay. And I just want to be clear.

21 Do you see the part of her table -- it's one, two, three,
22 four, five, six, seven -- eight rows down, it says "Total
23 engaged subs needed"?

24 **A.** Yes.

25 **Q.** She calculates out this total number of engaged subs, and

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1 then two up it says "Number incremental subs needed" -- strike
2 that -- "Number incremental subs to cover GM gap." Do you see
3 that?

4 **A.** That's right.

5 **Q.** And so that number, "Number incremental subs needed to
6 cover GM gap," that's one way of covering the gap that the
7 assumption about losing revenue share on Sony causes; right?

8 **A.** That's one of the ways and that's the number that she
9 reflects in her sentence above the chart.

10 **Q.** Right. Just to be clear, I think you had to explain this
11 to me before, this -- the numbers in that row going across,
12 that's not millions you need more each year; right? It's like
13 growing; is that right? It's not incremental to each year?

14 **A.** You don't sum those across. They are an individual number
15 in that year.

16 **Q.** Okay. So I'll use fake numbers so we don't violate
17 confidentiality.

18 So if I said in the first column 2 and the next column is
19 8, it's not saying, therefore, we needed to get 10 more people;
20 right?

21 **A.** That's correct. You need 8, yeah.

22 **Q.** So by the end, to Goal Seek it out and win, you need that
23 number at the far right three rows up, that one?

24 **A.** Did you say "win"?

25 **Q.** No, I'm sorry. To Goal Seek it out and make it up --

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1 **A.** That's correct.

2 **Q.** -- you need that number at the far; right?

3 Okay. So it's not incremental each year. You've got to
4 go find that number of people?

5 **A.** You have to -- well, fundamentally you have to acquire new
6 people. You'll have churn out at the bottom of that, but
7 that's the number that has to exist every single year.

8 **Q.** Okay. Now, that's one view, right, using the subscribers?
9 Or she says, and then this is the platform mix table at the
10 bottom (as read):

11 "We can do it if we can shift Activision revenues to
12 be greater on Microsoft console."

13 Right?

14 **A.** That's right. Again, I wanted to keep the variables in
15 this question to the variables that are in the model.

16 **Q.** Okay. And so she's doing -- I'm looking at the platform
17 mix box there on her e-mail, and so she calculates out (as
18 read):

19 "Okay. Let's" -- first row -- "revise Sony revenue."

20 So that means there's been a drop in revenue because of
21 this assumption that you've been asked to think about; right?

22 **A.** That's right.

23 **Q.** And then she says (as read):

24 "Okay. If we drop it by that much, here's how much
25 Microsoft revenue we'd need to close the gap"; right?

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1 A. Correct.

2 Q. And that adds up to some total Activision console revenue;
3 right?

4 A. That's right.

5 Q. And then it says (as read):

6 "Here's the platform mix we'd need."

7 So the percentage of Activision revenues that come from
8 the Sony platform and the percentage that come from the
9 Microsoft platform; right?

10 A. That's right.

11 Q. And that actually is the same straight across? It doesn't
12 really change; right?

13 A. I believe in this one you'd add those across. They have
14 to be yearly numbers.

15 Q. Right. But the percentages don't change? It's the same?

16 A. That's correct, yeah.

17 Q. Yeah. And then she says -- and then she has a column
18 explaining what that change would be; right? So if we can
19 increase Microsoft's share of the Activision revenues by that
20 number at the very bottom, we'll fill the gap?

21 A. Yes, that's -- yeah, put in the Excel.

22 Q. Let's please take a look at PX4359, please.

23 A. (Witness examines document.) Yes, I'm here.

24 Q. Okay. This is just more e-mails on the chain, and I'm
25 looking at your e-mail -- well, it's a chain between you and

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1 Ms. Lawver and the corporate development people again; right?

2 **A.** Yes.

3 **Q.** And it's a little bit later in time on the 15th of
4 January 2022; right?

5 **A.** That's right.

6 **MR. WEINGARTEN:** Move to admit PX4359.

7 **THE COURT:** Admitted.

8 (Trial Exhibit 4359 received in evidence.)

9 **BY MR. WEINGARTEN:**

10 **Q.** So everybody's working hard because it's just an hour or
11 so later, and there is an update from Ms. Lawver with new
12 numbers; right?

13 **A.** That's what it looks like, yes.

14 **Q.** Second e-mail down you write (as read):

15 "This is great. Should we make the model update for
16 the new board numbers and then run the below?"

17 And then you ask if people need to circle back with
18 Ms. Hood, and you say you'll circle back with Phil and Sarah.
19 Is that Mr. Spencer and Ms. Bond?

20 **A.** That's right.

21 **Q.** Okay. There's another updated table from Ms. Lawver, but
22 the update hasn't changed the revenue platform mix shift;
23 right? That hasn't changed?

24 **A.** That's correct.

25 **Q.** She sort of changed the subscriber numbers you'd need;

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1 right?

2 **A.** It looks like the ramp on subscribers has changed, yes.

3 **Q.** They actually -- she revised it and updated it and you
4 need slightly fewer incremental Game Pass subscribers to fill
5 the gap; right?

6 **A.** These numbers are lower than the last chart, that's right.

7 **Q.** And the interesting thing is -- well, strike that.

8 The Goal Seek here shows that you can do either of these
9 two things; right? It's if you do this with Game Pass
10 subscribers or this with getting more Activision revenues on
11 the Microsoft platform; right?

12 **A.** That's right. This is just Goal Seek.

13 **Q.** Right. But in reality, you could do a combination of the
14 two; right?

15 **A.** Sure.

16 **Q.** So the more Game Pass subscribers to help fill the gap,
17 then the less console revenue mix shift you would need; right?

18 **A.** Yes. It's just Excel. We can model very different
19 scenarios.

20 **Q.** Right. And, conversely, more revenue to Microsoft from
21 the Activision titles than fewer incremental Game Pass
22 subscribers are needed; right?

23 **A.** That's right.

24 **Q.** Now, fair to say that you were very busy during this time
25 period getting ready for this board meeting?

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1 A. Yes, fair.

2 Q. And, yet, despite that, I believe when we talked about
3 this, you and I, previously, you remember talking about these
4 potential variables in the board meeting and talking about the
5 variance of potentially between the deal model assumptions and
6 this scenario of revenue risk; right?

7 A. I believe my prior testimony if that's what I said, yes.

8 Q. Okay. And you remember something like that because it's
9 quite special to present to the board about something; right?

10 A. I take the presentations of the board very seriously of
11 course.

12 Q. Okay. And so, again, this model, this work product that
13 came out of the Satya/Amy meeting, the goal of it that you
14 understood to be was if revenues that Activision earns from the
15 Sony platform go down, tell us what the numbers would have to
16 be on subscribers and on our own console revenues to make up
17 for it; right?

18 A. Yeah, but I'd be specific and call it royalties not just
19 revenue.

20 Q. Understood.

21 But it's about a revenue -- the impact is a revenue risk
22 from Activision games on Sony; right?

23 A. That's correct.

24 Q. Let's please look at PX4367.

25 A. (Witness examines document.) Yes, I'm here.

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1 Q. Okay. You're in this chat with, again, it's Ms. Lawver
2 and some of the same corporate development folks who have been
3 on these e-mails; right?

4 A. That's right.

5 Q. You guys are working all the channels? The e-mails? The
6 chats? It's busy? Yes?

7 A. Very busy.

8 Q. Okay. So this is dated January 15th as well.

9 MR. WEINGARTEN: Move to admit PX4367.

10 THE COURT: Admitted.

11 (Trial Exhibit 4367 received in evidence.)

12 BY MR. WEINGARTEN:

13 Q. Now, start at the top. You write (as read):

14 "I think we need the following: I'll take a look at
15 the Q4 commentary and slide in the board review. Jamie
16 will update the FY '22 and FY '23 model, put it as final
17 into the appendix of the deck. We need to ensure we have
18 the final accretion/dilution with" -- and then you have
19 some numbers you're talking about.

20 And you're saying (as read):

21 "Let's update some things and put it into the
22 appendix."

23 Do you see that?

24 A. Yes.

25 Q. At the bottom of the chat you sent at 17:14 and 39

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1 seconds, it's like the last or second-to-last sentence, it says
2 (as read):

3 "This will be included in the appendix of the board
4 deck. Risk to financials on platform royalties. Waiting
5 on confirmation of redacted materials but assume the Call
6 of Duty royalty rate moves from" -- and we have that
7 amount -- "the scenario highlights where we would net out
8 our model to offset that change, mix shift to Xbox
9 Game Pass subscribers of approximately 2 million per
10 year" -- (vocal indication.)

11 **MR. GOSTAN:** Don't say the numbers.

12 **MR. WEINGARTEN:** Sorry. My bad.

13 **BY MR. WEINGARTEN:**

14 **Q.** (as read):

15 -- "or blank unit mix."

16 My apologies. I don't know if anyone understood my
17 gobbledygook anyway. I apologize for that.

18 **A.** I see that.

19 **Q.** Mix shift of users, and I apologize.

20 So at that point in time, as you're making the final board
21 deck, the number of mix shift to Xbox had actually declined to
22 that -- see where it says the number PT?

23 **A.** I see that, yeah.

24 **Q.** Okay. So that number is even less than the one that
25 Ms. Lawver had calculated previously on some of the tables

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1 we've seen; right?

2 **A.** I believe that number is lower than the other number.

3 **Q.** So even with a mix shift of just that number, that would
4 be enough in the Goal Seek to make up for the lost Activision
5 revenue; right?

6 **A.** Related to this royalty discussion we're having.

7 **Q.** Right.

8 **A.** Yes.

9 **Q.** And then you point out, as you and I were just discussing,
10 and actually, quote, "likely a combination of Xbox Game Pass
11 subscribers and mix shift"; right?

12 **A.** Correct.

13 **Q.** Okay. Now, let's take -- did you believe that -- well,
14 strike that.

15 You believed that these numbers that we just talked about
16 represented reasonable numbers; right?

17 **A.** What does "reasonable" mean?

18 **Q.** Let me -- let's go to PX4472, please.

19 **MR. WEINGARTEN:** And if I didn't admit it, move to
20 admit PX4467, please.

21 **THE COURT:** It's already in evidence.

22 **BY MR. WEINGARTEN:**

23 **Q.** PX4472, please. This is an e-mail from you to Ms. Hood,
24 Mr. Spencer, Ms. Bond, other folks. We're still on the 15th of
25 January, still the early evening; right?

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1 A. Correct.

2 Q. Okay.

3 MR. WEINGARTEN: Move to admit PX4427.

4 THE COURT: Admitted.

5 (Trial Exhibit 4472 received in evidence.)

6 BY MR. WEINGARTEN:

7 Q. Okay. And you're saying -- I think this is you giving the
8 update to the question that generated all this work; right?

9 A. Yes, that's correct.

10 Q. You're telling Ms. Hood and the others "Updating on the
11 key items from our SLT discussion yesterday"; right?

12 A. That's right.

13 Q. Okay. A couple of different items there. The third item,
14 risk to financials on platform royalties; right?

15 A. Yes.

16 Q. And you say (as read):

17 "Waiting on confirmation of redacted materials, but
18 this scenario assumes the Call of Duty royalty rate moves
19 from" --

20 And then you give the number; right?

21 A. Correct.

22 Q. And then it says (as read):

23 -- "scenario highlights where we would net out our
24 model to offset that change of" --

25 And that's a negative -- that's a number there, right, of

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1 dollars?

2 **A.** That's correct.

3 **Q.** And so what that's saying is: If we assume the revenues
4 earned on Activision -- strike that -- if we assume the
5 Activision royalty revenues on PlayStation go down because of
6 that revenue split changing, it will hurt the model by that
7 much per year; right?

8 **A.** That's right.

9 **Q.** And if it hurts the model by that much per year, we
10 calculate that a mix shift to more Game Pass subscribers of
11 blank or a blank point mix shift towards Xbox and likely a
12 combination of the two would make up for it; right?

13 **A.** That's correct.

14 **Q.** And you write that both of those figures are reasonable;
15 right?

16 **A.** That's right. And in this context, I can believe the
17 outcome of that. Whether it's likely or not or realistic is
18 different. I'm saying they're within the range that I would
19 expect.

20 **Q.** And you understood when you wrote "reasonable,"
21 "reasonable" means achievable?

22 **A.** It means I could believe that as an outcome, my choices
23 would be unreasonable or reasonable and I chose reasonable.

24 **Q.** But you understood "reasonable" to mean achievable in that
25 e-mail; right?

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1 **A.** Yes. They're in the realm of achievability.

2 **MR. WEINGARTEN:** Okay. I have nothing further at this
3 time, Your Honor.

4 **THE COURT:** Okay.

5 **MR. WEINGARTEN:** I'm very sorry about that slip.

6 **CROSS-EXAMINATION**

7 **BY MR. GOSTAN:**

8 **Q.** Good morning, Mr. Stuart.

9 **A.** Good morning.

10 **Q.** How long have you worked at Xbox for?

11 **A.** 21 years.

12 **Q.** Is that most of your career?

13 **A.** That is the entirety of my adult working career.

14 **Q.** And you're the Xbox CFO; correct?

15 **A.** That's correct.

16 **Q.** How long have you been in that role for?

17 **A.** About nine years.

18 **Q.** And I think you testified to this, but you report
19 ultimately to Amy Hood and not to Phil Spencer?

20 **A.** That's correct.

21 **Q.** And why is that?

22 **A.** Yeah, Microsoft we have a fiduciary responsibility as the
23 finance team to represent shareholders, represent the business,
24 and the finance team does not work for the business leader of
25 the various divisions.

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1 Q. So as part of your responsibility in providing that
2 information, do you look at the pricing of different Xbox
3 products?

4 A. We do.

5 Q. And I believe there's some testimony about the price of
6 Xbox Series X and Xbox Series S?

7 A. That's correct.

8 Q. And what are the prices of those?

9 A. Series S is \$299 and Series X is \$499.

10 Q. And of the different consoles up here, just focusing on
11 Series S, is the Series S most closely priced compared to any
12 of these up here?

13 A. The series --

14 Q. There's the Nintendo Switch. Just -- you may not be able
15 to see that.

16 A. Oh, I did not see that down there.

17 Q. We've got the Nintendo Switch. We've got the X and S, and
18 we've got the PlayStation 5. And I'm asking for Series S,
19 which one is it most closely to?

20 A. Thank you. I didn't see the Switch.

21 It's most closely to Switch.

22 Q. And do you look at Switch pricing when you're considering
23 the pricing of Xbox Series S?

24 A. Yes.

25 Q. And is that one of the reasons you set the price where you

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1 guys did?

2 **A.** Yes. At that price point when you're considering playing
3 FIFA or Minecraft or many of the games across consoles, you
4 have to make sure you're priced relative to the competition in
5 the market.

6 **MR. GOSTAN:** One second. I forgot to give you your
7 documents. Hold on.

8 May I approach, Your Honor?

9 **THE COURT:** Yes.

10 (Pause in proceedings.)

11 **BY MR. GOSTAN:**

12 **Q.** Could you turn to RX1066, please?

13 **A.** (Witness examines document.)

14 **MR. GOSTAN:** Sorry about that, Your Honor. I promise
15 I'm not going to waste any more time getting binders.

16 **THE COURT:** That's okay.

17 **BY MR. GOSTAN:**

18 **Q.** So can you turn to RX1066?

19 **A.** Yes, I'm here.

20 **Q.** And there was some questions about mobile and the
21 valuation and the strategy for the deal.

22 So can you just describe, just at a very high level, what
23 this e-mail is?

24 **A.** Yeah. This e-mail is referencing Activision Blizzard's
25 earnings from their Q1 in March of 2020, and it proceeds -- I

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1 sent an e-mail out to the Gaming Leadership Team highlighting a
2 few of the key drivers, and then Matt Booty and myself had a
3 discussion after that.

4 **MR. GOSTAN:** Move to admit RX1066.

5 **THE COURT:** Admitted.

6 (Trial Exhibit 1066 received in evidence.)

7 **BY MR. GOSTAN:**

8 **Q.** So taking a look at that e-mail at the bottom --

9 **MR. GOSTAN:** And we can publish it, please.

10 (Pause in proceedings.)

11 **BY MR. GOSTAN:**

12 **Q.** If you take a look at the e-mail on the bottom, you said
13 that's an earnings summary of Activision Blizzard?

14 **A.** That's right.

15 **Q.** And is this before you started negotiating with Activision
16 Blizzard about a potential acquisition?

17 **A.** That's correct.

18 **Q.** I'd like you to take a look at the first couple of
19 sentences. It says (as read):

20 "Activision Blizzard ATVI announced its FY '21 Q1
21 financial results on May 4th. ATVI beat analysts
22 expectation across revenue. MAU" --

23 What did you understand "MAU" to mean?

24 **A.** That's monthly active users.

25 **Q.** (as read):

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1 -- "and earnings citing strong performance across Call
2 of Duty Modern Warfare and War Zone."

3 Then it says (as read):

4 "CEO Bobby Kotick free-to-play in mobile as new entry
5 points to the franchise have helped triple monthly active
6 users to 150 million."

7 Do you see that?

8 **A.** Yes.

9 **Q.** Did you think that was a significant thing?

10 **A.** Significant and very notable about how they're growing
11 their business.

12 **Q.** And then you sent that around to the gaming leadership,
13 and Matt Booty sent you an e-mail back. Can you remind us who
14 Matt Booty is?

15 **A.** He's the head of Xbox Game Studios.

16 **Q.** Is he in charge of developing games at Xbox?

17 **A.** That's right.

18 **Q.** And he wrote back to you (as read):

19 "The talk track about taking the big franchises to
20 mobile makes me feel way out of position. Have to get
21 going there. COD on mobile is going to dwarf console."

22 What did you understand him to mean there?

23 **A.** Yeah, when we looked at Activision Blizzard's earnings in
24 this context, mobile was the primary growth of their monthly
25 active users. We had tried a few times on our side to make

1 effort into mobile, but really to no success. And what he's
2 referencing here is really the outlook of Call of Duty on
3 mobile, and that's going to be far bigger than what's on the
4 console.

5 **Q.** And you write back (as read):

6 "Hundred percent right. We'll get out of position on
7 this one if we keep our eyes on the console game only.
8 Don't want to be the oil company when the world shifts to
9 a hundred percent electric cars."

10 And what were you trying to say there?

11 **A.** Yeah, back in May of 2021, I'm effectively agreeing with
12 him; and if we keep our eyes and our focus on the console space
13 only, we'll lack growth, we won't expand into more users like
14 its highlighted here, and we don't -- my point about the oil
15 company, when the world shifts to electric cars, is you just
16 don't want to be on a business model that's not going to exist
17 in the future.

18 **Q.** We've heard a little bit about native mobile games for
19 streaming to mobile devices. Can you just describe the
20 difference briefly?

21 **A.** Yeah. Native games are ones that are downloaded, you
22 know, directly to your phone. Typically the IOS or Android app
23 stores would be examples of that.

24 Streaming would be used through a browser, streamed from
25 some cloud somewhere to a mobile endpoint.

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1 Q. And here, are you discussing native mobile games or
2 streaming to mobile devices?

3 A. This is all native. This is referencing the work they're
4 doing specifically on Call of Duty, but they've done it with
5 others. This is all the native download.

6 Q. And is it fair to say that one of the reasons you were
7 interested in acquiring Activision Blizzard is because of that
8 capability?

9 A. Yeah. One of the most important reasons and focus for our
10 growth is mobile users and mobile market.

11 Q. And -- but Xbox does have streaming to mobile devices
12 right now; right?

13 A. We do have something called Project xCloud, which streams
14 to mobile devices.

15 Q. And in your view, has that been a successful business?

16 A. We're still early. I would say not successful to where we
17 want it to be. It's not growing users and economics are still
18 not yet where we want them to be.

19 Q. Does it generate a profit for Xbox?

20 A. xCloud does not generate profit.

21 Q. Is your understanding that the native mobile games that
22 Activision have do generate significant profits?

23 A. They generate significant profit.

24 Q. Okay. You can put that document aside.

25 I want to move to Activision now, and I just want to ask

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1 you a few brief questions about what's going to happen if this
2 deal goes through and Activision is acquired by Microsoft.

3 Are you involved in the planning for integration of
4 Activision into Xbox if the deal goes through?

5 **A.** Yes, I am.

6 **Q.** And are you familiar with the term "limited integration"?

7 **A.** I am.

8 **Q.** What does that mean at Microsoft?

9 **A.** Yeah, limited integration reflects how we think about an
10 acquired company. The prior, you know, four or five
11 acquisitions we've done, ZeniMax included, are all limited
12 integration, which means we don't bring their org into our org,
13 in terms of org charts. They typically stay on their own.
14 Healthcare. They have their own compensation plan. They stay
15 with their own real estate and facilities and operates
16 effectively like a separate entity.

17 **Q.** And do they retain their own game developer talent as
18 well?

19 **A.** That's right, they retain their own talent and development
20 scenarios.

21 **Q.** And is the plan if you acquire Activision, to have it be a
22 limited integrated company?

23 **A.** It is. We would keep them limited integration.

24 **Q.** So can you -- there was some discussion of -- there's been
25 a lot of discussion about Minecraft and there was also some

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1 discussion of your comments at the Jefferies meeting.

2 Can you pull up PX9192?

3 **A.** From the big binder?

4 **Q.** Yes, from the big binder.

5 (Pause in proceedings.)

6 **THE COURT:** All right. We'll have to proceed this
7 way.

8 **MR. GOSTAN:** That's fine. I'll just read slowly.

9 **BY MR. GOSTAN:**

10 **Q.** So can you pull up 9192 in your binder?

11 **A.** Yes, I'm here.

12 **Q.** And if you go to page 14014.

13 **A.** (Witness examines document.) Yes.

14 **Q.** And you were asked some questions about some of your
15 quotes on there, but FTC's Counsel didn't read the quote at the
16 top. I'm going -- I'd just like to read that to you and ask
17 what you're talking about there.

18 So at the top you say (as read):

19 "Yes, the goal hit here is, what I'll say, from a
20 cross-platform perspective. Microsoft is a platform.
21 We're one of the first to really support Minecraft,
22 Roblox, Fortnite across platforms. So we highly encourage
23 cross-platform play simply from this landscape of if it's
24 a good for the gaming ecosystem, it's good for us.
25 Classic rising tide lifts all boats."

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1 What were you referring to there?

2 **A.** Yeah, Microsoft in its DNA is a platform company. Some of
3 the biggest games in the world -- I reference Minecraft,
4 Roblox, Fortnite, Call of Duty -- are strong across all
5 platforms, and those are the ones that have the biggest
6 communities of players, typically generate the most money and
7 most profit, and have the biggest impact across gaming.

8 In this case, around Minecraft, Roblox, or Fortnite, we
9 were the first -- one of the first ones to allow cross-platform
10 play. So PlayStation users could play against Xbox users and
11 Switch users there as well.

12 And we allowed entitlements to roam, we allowed log-ins to
13 roam, which allows users to roam across the device they choose
14 to play on.

15 **Q.** And at the end you said (as read):

16 "It's good for the gaming ecosystem. It's good for
17 us. Classic riding tide lifts all boats."

18 What did you mean by that?

19 **A.** Yeah, we operate in the gaming market and the gaming
20 market has many platforms, many devices, many users. If the
21 gaming industry is growing and we are a player in that
22 industry, that's good for us.

23 So there are some decisions that we may make that are
24 potentially impactful to us; but if we believe that is good for
25 the gaming industry, we'll also make those calls.

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1 Q. And is it also profitable for Xbox to continue to have
2 games like Minecraft be multiplatform and cross platform?

3 A. Absolutely. The strength of a game like Minecraft comes
4 from that cross-network play. If you, you know, removed one of
5 those platforms and one of those big user bases, not only --
6 not only would you have a massive brand impact, you would lose
7 a significant revenue stream that you just couldn't make up
8 for.

9 Q. And Microsoft acquired Mojang, the studio that created
10 Minecraft; correct?

11 A. That's right.

12 Q. And you've kept Minecraft on multiple platforms; is that
13 right?

14 A. That's right.

15 Q. I'd like to take a look at another document. This is a
16 confidential document so we'll have to talk a little bit around
17 it, but can you take a look at RX1137?

18 A. (Witness examines document.) Yes, I'm here.

19 Q. And not really divulging the details of the e-mail, but
20 can you just say what this document is?

21 A. This is an e-mail from myself to the Gaming leadership
22 team. It's our financial results through the first seven
23 months of the year. This happens to be January of FY '21.

24 MR. GOSTAN: Move to put RX1137 into evidence, please.

25 THE COURT: Admitted.

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(Trial Exhibit 1137 received in evidence.)

MR. GOSTAN: Thank you.

BY MR. GOSTAN:

Q. And if you take a look at the second line of your e-mail, the second paragraph starts with "Favorability." Can you just read that to yourself?

A. (Witness examines document.) Yes.

Q. And can you just describe at a high level what you were discussing there?

A. Yeah. This is us exiting the holiday period, which is one of our biggest sales periods of the year, and particularly noteworthy that Minecraft had a very good holiday and specifically on PC and Nintendo. We saw a lot of new user growth. We saw solid monetization, and it was worth me calling out to the Gaming Leadership Team that PC and Nintendo were particularly strong coming out of the holiday.

Q. Is Minecraft a significant revenue driver for Xbox?

A. Yes.

Q. Can you turn to page 67?

A. (Witness examines document.)

Q. And this is a slide deck that's attached to the e-mail. Can you just explain what this slide deck is?

A. Yeah. This is a close deck that I put together with my team every month, and it includes various summaries of revenue, various key metrics in the business, and it walks through the

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1 majority of our overall revenue streams.

2 Q. Let me know when you're on the right page.

3 A. Yes, I'm here.

4 Q. Okay. And what is this slide?

5 A. This is a Minecraft-specific slide. It's now a few years
6 old, but in FY '21 it reflects where Minecraft is generating
7 its revenue from and ultimately its gross margin.

8 Q. And this is revenue you said for the first seven months of
9 the year?

10 A. That's right.

11 Q. Is there a place on this chart, without revealing the
12 numbers, where we can see the revenues that Minecraft generates
13 across different platforms?

14 A. Yeah. If you go to the -- it says "FY '21 year to date,"
15 the column that's in the middle, and then if you look at the
16 actual column, that's our year-to-date actuals.

17 Q. And is Xbox one of the platforms that revenues reported
18 for?

19 A. It is.

20 Q. And how does that compare to some of the other platforms
21 on there?

22 A. It is the smallest.

23 Q. Okay. And is PlayStation also on there?

24 A. It is.

25 Q. And how just at a high level, without giving the numbers,

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1 how did the PlayStation revenues compare to Xbox?

2 A. Roughly twice as big.

3 Q. And Nintendo, is Nintendo on there as well?

4 A. Correct.

5 Q. And how does Nintendo compare to the other platforms?

6 A. Roughly twice as big as PlayStation.

7 Q. And so that would be four times as big as Xbox?

8 A. Correct.

9 Q. You're the CFO, not me, so I'll trust your math.

10 A. It's four times as big as Xbox.

11 Q. And also sales on mobile and PC as well?

12 A. Yeah. We highlight IOS and Android as well as our PC
13 platform sales.

14 Q. Okay. And if you go down to the bottom, there's net
15 revenue and gross margin. Do you see that --

16 A. Yes.

17 Q. -- in the same column?

18 A. Yep.

19 Q. And what is gross margin?

20 A. Gross margin is when we call -- when we think about taking
21 out, like, billing costs, you think about cost to serve, you
22 think about royalties that we would pay out for various
23 platforms and other things. It's effectively the profit of
24 that revenue stream.

25 Q. And if you compare the net revenue to the gross margin or

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1 the profit number, what does that tell you about how profitable
2 Minecraft is?

3 **A.** Minecraft is one of the most profitable, if not the most
4 profitable, IP that we have.

5 **Q.** And is that consistent with -- generally when you're
6 looking at the profitability of first-party games, do they
7 generally have high-profitability margins?

8 **A.** Generally speaking, that's right. First-party games are
9 one of our highest profit revenue streams that we have.

10 **Q.** And just comparing Minecraft to Activision Blizzard, are
11 they similar at all in sort of their financial breakdown?

12 **A.** I would assume -- yes, I would assume they're similar,
13 both very large revenue streams and actively engaged.

14 **Q.** So there's high revenue on PlayStation, for example, for
15 Activision games like Call of Duty?

16 **A.** Yes, and as I would assume, much bigger than these
17 numbers.

18 **Q.** And there's also Nintendo numbers on here, and isn't it --
19 is Call of Duty on Nintendo right now?

20 **A.** No.

21 **Q.** And -- but has Xbox entered into a contract to make Call
22 of Duty available on Nintendo?

23 **A.** We have.

24 **Q.** And you discussed previously with FTC's Counsel what would
25 happen if there was a shift in the revenue share from

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1 PlayStation, if it went from one revenue split to another
2 revenue split for Call of Duty and how you'd have to make up
3 that. Do you remember that?

4 **A.** Yes.

5 **Q.** And one of the things you talked about was a shift in
6 platforms?

7 **A.** Yes.

8 **Q.** Is it also possible that you could make up some of that
9 gap by putting Call of Duty on additional platforms?

10 **A.** That's right.

11 **Q.** And could one of those platforms be Nintendo?

12 **A.** Yes.

13 **Q.** A few final questions for you.

14 If this acquisition goes through, will Call of Duty be a
15 first-party game for Xbox?

16 **A.** It will.

17 **Q.** And when selling an Xbox first-party game, is it more
18 profitable to sell that game on Xbox or PlayStation?

19 **A.** It can vary. As we know, in our business we have a
20 console subsidy so we lose money when we sell a console on day
21 one; and depending on what that consumer does after that
22 console is bought, it can be, I'll say, profitable or not in
23 terms of different types of speed of profitability.

24 So the example here would be if someone is a Call of Duty
25 player and they buy just one copy of Call of Duty or even just

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1 a couple copies of Call of Duty and they buy an Xbox with a
2 console subsidy, you may not be profitable on that user. It
3 would take time to make that gap up. So more game sales, many
4 years in some cases.

5 If a PlayStation user was a Call of Duty player only and
6 they bought one game on PlayStation, you are more profitable in
7 that scenario than it would be trying to sell a console subsidy
8 out of the gate in a few games.

9 **Q.** Just to clarify, though, if it's more profitable to sell
10 games on PlayStation, why do you ever take games exclusive?

11 **A.** Exclusivity is a part of our industry. It's something we
12 need to support our brand and sell Xbox, and that's one of the
13 levers that we can pull to make that happen.

14 **Q.** But does it make financial sense to make all games
15 exclusive?

16 **A.** No. For games, like you can see with Minecraft, if you
17 made that exclusive, for example, you'd have nowhere near the
18 success of that. For games specifically like Call of Duty that
19 are highly multiplayer-based games, large communities, that
20 would not make sense to make it single platform.

21 **Q.** So from a financial -- just so we have a clear record,
22 from a financial perspective, as Xbox CFO, do you think it
23 would make sense to take Call of Duty exclusive?

24 **A.** No.

25 **Q.** And Ms. Hood didn't ultimately get to testify today, but

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1 if you tried to explain to Ms. Hood that it made financial
2 sense to take Call of Duty exclusive, how do you think she
3 would react to that?

4 **A.** She would say probably that doesn't make sense and you
5 need to keep the existing business model running.

6 **MR. GOSTAN:** No further questions.

7 **THE COURT:** I have a couple questions.

8 You said the Nintendo, if Call of Duty goes there, that
9 will make some money; but I believe from earlier testimony, you
10 didn't run a model on that.

11 **THE WITNESS:** No. We did not run a financial model
12 specifically, no.

13 **THE COURT:** Why not?

14 **THE WITNESS:** In this example what we think about is
15 some of the Switch users that are there are brand new
16 customers, customers that wouldn't be on Xbox or PlayStation
17 but it represents an opportunity for us. We didn't run it
18 specifically because it just wasn't one of the scenarios that
19 we looked at.

20 (Pause in proceedings.)

21 **THE COURT:** We didn't run it because we didn't look at
22 that scenario. Okay. So you didn't run it?

23 **THE WITNESS:** We didn't run it, that's right. We
24 didn't run that model, that's correct.

25 **THE COURT:** So there isn't any -- you can't quantify

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1 it because you didn't look at it?

2 **THE WITNESS:** That's correct, yeah.

3 **THE COURT:** And then with respect to X Pass [sic], the
4 day and date, what is the policy? Like, what games go on
5 there? What games go on X Pass [sic]?

6 **THE WITNESS:** So Xbox Game Pass, when we say "day and
7 date," is usually our first-party games, so games that are in,
8 you know, the Xbox umbrella. When they launch to the public,
9 they'll launch at retail. So think Best Buy, Wal-Mart, Target.
10 We'll launch them in our digital stores for sale 60 or \$70, and
11 we'll also put them on that same day in the Game Pass
12 subscription service.

13 So a customer can decide if they want to buy if for 60 or
14 \$70; or if they're a subscriber to Game Pass, they can play the
15 game that way on the same day it's released.

16 **THE COURT:** And do you do that with all first-party
17 games?

18 **THE WITNESS:** We do, that's correct, yeah.

19 **THE COURT:** Okay.

20 **MR. GOSTAN:** Nothing further. Thank you.

21 **THE COURT:** Mr. Weingarten?

22 **MR. WEINGARTEN:** Nothing further, Your Honor. Thank
23 you.

24 **THE COURT:** Okay. Thank you. You are excused.

25 (Witness excused.)

PROCEEDINGS

1 **THE COURT:** Okay? Do we have any further witnesses.

2 **MR. WEINGARTEN:** I don't believe so, Your Honor.

3 **THE COURT:** That was a rhetorical question.

4 (Laughter)

5 **THE COURT:** Okay. All right. Great.

6 So we are going to, then, take a break until 2:30 where
7 we'll do closing arguments. I assume the FTC will go first.

8 However, I'd like you to take it sort of anticompetitive
9 harm by anticompetitive harm. You sort of identified three
10 markets. I mean, there's been overlap on things, but I guess
11 what I'm saying is I want someone from Microsoft up here too;
12 right? So that we can have an engagement.

13 The other thing is, and it's wonderful that many people
14 have taken witnesses in this case, you do not -- if somebody
15 wants to get up and say something or take something back that
16 someone else says, that's all fine. All right? You guys have
17 been teams, and it's all right to have a team do the argument
18 as long as it doesn't get too chaotic.

19 **MR. WEINGARTEN:** That's a great relief for someone
20 doing the argument. Thank you.

21 **THE COURT:** Yeah. Okay. Absolutely. I just want to
22 get it right --

23 **MS. WILKINSON:** We appreciate it, Your Honor.

24 **THE COURT:** -- and so whatever helps me the most is
25 the best.

PROCEEDINGS

1 All right. We'll see you at 2:30 then.

2 (Luncheon recess was taken at 11:18 a.m.)

3 **AFTERNOON SESSION**

2:28 p.m.

4 **THE CLERK:** Remain seated. Come to order. Court is
5 now in session.

6 **THE COURT:** Okay. Good afternoon.

7 **MS. WILKINSON:** Your Honor, may I correct one of my
8 mistakes? I entered RX4033, and it's not part of Ms. Hood's
9 declaration. So I'd like to withdraw that. And then there
10 were several I should have entered and I did not.

11 **THE COURT:** Okay.

12 **MS. WILKINSON:** RX1186, RX1187, RX1128, RX1133,
13 RX1120, RX1119, RX1140, RX1154, RX1156, and RX3166.

14 **THE COURT:** All right. Admitted.

15 (Trial Exhibit 4033 withdrawn.)

16 (Trial Exhibits 1186, 1187, 1128, 1133, 1120, 1119,
17 1140, 1154, 1156, and 3166 received in evidence.)

18 **THE COURT:** Okay. Are we ready to proceed?

19 **MR. WEINGARTEN:** Yes, Your Honor.

20 **THE COURT:** All right. Whoever wants to come up
21 first, but both sides at the same time, but we'll start with
22 the FTC.

23 **MR. WEINGARTEN:** If Your Honor would like, I have
24 prepared remarks, but I'm happy to jump right into --

25 **THE COURT:** Why don't you start with your prepared

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1 then. I'm sure I'll have some questions.

2 **MR. WEINGARTEN:** Okay. Certainly.

3 **CLOSING ARGUMENT**

4 **MR. WEINGARTEN:** Well, thank you, Your Honor, to you
5 and the staff for your time and attention this past week as we
6 have put on our evidence.

7 Last Thursday, we promised the Court that the evidence in
8 this hearing would show that the Federal Trade Commission has
9 raised substantial questions about this proposed transaction,
10 substantial questions about whether this transaction would
11 cause anticompetitive effects in multiple relevant markets.

12 And we promised Your Honor and the Court evidence that
13 would be sufficient to raise those questions; and although I
14 never want to take on a higher burden than I have to, I think
15 we've brought Your Honor evidence that shows the answer to even
16 those questions. That's not what we're required to do here,
17 but we have brought Your Honor significant evidence about the
18 relevant markets that are at play, about the nature of
19 competition in those markets, the role of content in each of
20 those markets and, critically, about Microsoft's ability and
21 incentive to cause competitive harm in each of those markets if
22 this acquisition is completed.

23 Now, all the evidence has shown, Your Honor, that Call of
24 Duty and AAA games in particular and even some of the other
25 Activision franchises drive gamers. That is the nature of this

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1 transaction. It is the nature of the vast majority of the
2 synergies that Microsoft projects coming out of this
3 transaction.

4 **THE COURT:** You mean the content is critical?

5 **MR. WEINGARTEN:** Content is critical, Judge. Content
6 is critical.

7 We looked this morning at the synergies figures and
8 there's an existing business line and there's the synergies
9 lines, and the majority driver by far of the synergies from
10 Microsoft comes from driving users to engage and join Game Pass
11 because they understand the value of this content.

12 Now, we've also heard, Your Honor, quite a bit about
13 decisions involving ZeniMax. Why do we bring all of that
14 evidence about ZeniMax to Your Honor?

15 That evidence, Your Honor, is evidence of Microsoft's
16 incentives when it comes to valuable content.

17 **THE COURT:** Well, so let's talk about ZeniMax. So
18 which ZeniMax title is comparable to Call of Duty in that when
19 it was acquired by Microsoft, it was a multiplatform
20 multiplayer game?

21 **MR. WEINGARTEN:** The best example of the three or four
22 that they've talked about bringing exclusive I think is the
23 Elder Scrolls franchise. They'll tell you it's not comparable
24 because it's an expansion pack or it's a different kind of a
25 title, but that one, we think, is one of the most like Call of

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1 Duty.

2 Now, I will say --

3 **THE COURT:** Well, so then -- so that was ZeniMax, and
4 it's currently -- there's Elder Scrolls 6 I think we heard is
5 coming out?

6 **MR. WEINGARTEN:** It is to come. It has not yet
7 launched. Mr. Spencer testified on our examination that they
8 have announced that it will be exclusive.

9 But I want to be very clear. Trying to find analogies and
10 categories of which game is like the other is not going to be
11 the issue before this Court. One can always create a category
12 of one. I think lawyers are exceptional at distinguishing.

13 The issue is: If there is a category of one, it's because
14 Call of Duty is so exceptionally valuable and it's so unique
15 because it's every year and it drives so much revenue.

16 And whether a title from ZeniMax is exactly like it or not
17 on some dimension, what the ZeniMax experience shows is that if
18 Microsoft, as a platform owner, controls the content, it will
19 use that content to the benefit of its own platforms.

20 **THE COURT:** Well, it will use that content in the way
21 to make the most money.

22 **MR. WEINGARTEN:** Correct.

23 **THE COURT:** Yes.

24 **MR. WEINGARTEN:** Yes. And our case does not require
25 any more complicated theory of behavior than that.

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1 If Your Honor concludes that Microsoft is a
2 profit-maximizing corporation and will use valuable content to
3 aid its shareholders, which it's right insofar as that goes,
4 then the evidence that we have shown is, the incentives are to
5 use that content to benefit its platforms and in doing so, it
6 will harm competition because it will take that content and
7 make it day and date on --

8 **THE COURT:** How does that -- how does that harm
9 consumers?

10 **MR. WEINGARTEN:** So the consumer, Your Honor, instead
11 of having Mr. Kotick at an independent Activision and deploy
12 his platform-agnostic philosophy that he talked about on the
13 stand on direct, Mr. Kotick would bring his content everywhere
14 gamers can be found. He wants them playing all of his content
15 wherever.

16 Now the consumer, if the deal goes through, has to find at
17 least some content, some of it, only on the Game Pass.

18 **THE COURT:** Oh, you don't mean just day and date. You
19 mean day and date and exclusive.

20 **MR. WEINGARTEN:** We mean day and date and exclusive --

21 **THE COURT:** Right.

22 **MR. WEINGARTEN:** -- but also even day and date is a
23 type of exclusivity because they won't give it day and date
24 necessarily to anyone else; right? So having the ability to
25 say "We've launched the game, it's come out on the console, and

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1 on the same day it's come to Game Pass," I don't think there's
2 any guarantee, nor can there be, of a day and date to every
3 other possible --

4 **THE COURT:** Like Sony does with Activision; right? I
5 think we heard testimony as to that --

6 **MR. WEINGARTEN:** Yes.

7 **THE COURT:** -- that Activision releases games not
8 equally, not in parity.

9 **MR. WEINGARTEN:** Right.

10 **THE COURT:** They take money --

11 **MR. WEINGARTEN:** Yes.

12 **THE COURT:** -- from other platforms and delay.

13 **MR. WEINGARTEN:** That's right.

14 **THE COURT:** Yes.

15 **MR. WEINGARTEN:** And there is -- again, there is a
16 difference between exclusivities that are pro-competitive and
17 exclusivities that are not pro-competitive, that are
18 anticompetitive. So this case is not about saying all
19 exclusivities are bad. That is also a red herring and not the
20 FTC's theory.

21 If Sony says to Activision "Here's money and we'll help
22 you develop a game or use this money to make something
23 interesting or neat and the cost of us giving you the money,
24 the *quid pro quo* is let us have first access for a period of
25 time or exclusive access to the neat new thing you've created

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1 for gamers," that's pro-competitive. That money was used to
2 make something that the consumer or the gamer wants to play and
3 enjoy.

4 The difference, Your Honor, is if you acquire the content,
5 you're not necessarily doing any new investment and you're
6 cutting off that entire process of competition and saying: Now
7 the game is available only on our platform or certain aspects
8 of it are only available.

9 **THE COURT:** Why don't we start, why don't you sort of
10 be a little bit more precise and tell me exactly what is the
11 harm to consumer? Like, what they are. Maybe tell me what
12 they are, and then let's evaluate each one.

13 **MR. WEINGARTEN:** Okay. So the harms to consumers are
14 very similar across all of the markets that we've alleged.

15 On the one hand, there's a reduction of choice.

16 **THE COURT:** No, no, no. So let's start with -- let's
17 start with the platform market then; right? That you have --
18 Professor Lee has the Generation 9 --

19 **MR. WEINGARTEN:** Yes.

20 **THE COURT:** -- console market.

21 Okay. So if the merger goes forward, what is the -- how
22 may that substantially lessen competition in a way that harms
23 consumers?

24 **MR. WEINGARTEN:** Right. So if the merger goes forward
25 and if you believe that Microsoft has the incentive to use the

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1 content to advantage its own platform, then there will be
2 content, there will be timing issues, there will be
3 exclusivities that benefit only the Xbox and not the
4 PlayStation.

5 **THE COURT:** Okay. So now let's break that down. What
6 is the evidence -- aren't we just talking about Call of Duty?
7 I mean, otherwise, then why -- then Sony just acquired another
8 publisher. They've shown they make a lot of stuff exclusive;
9 right? So it -- you're saying -- and you told me Call of Duty
10 is a one, a different. This case has really always been about
11 Call of Duty and how that's going to drive. So just play that
12 out precisely.

13 **MR. WEINGARTEN:** Well, I'm -- I am slightly hesitant
14 only because they do have some other pretty exceptional
15 franchises at Activision, like the Diablo franchise we heard
16 about, and Professor Lee models some of the harms that come
17 from the Diablo franchise as well in his report, but there is
18 no question Call of Duty is an exceptional asset.

19 **THE COURT:** Let me ask you this: If Sony actually had
20 an agreement with Microsoft, the ten-year, to keep Call of Duty
21 and future versions of Call of Duty on PlayStation and future
22 versions of PlayStation, would we be here?

23 **MR. WEINGARTEN:** Well, we might be here because we
24 would need to evaluate that agreement and understand all of the
25 facts.

THE COURT: Let's say it's an agreement and they're going to abide by it and, therefore, Call of Duty will be on PlayStation, all the iterations, from now for ten years, would we be here?

THE COURT: Well, that's --

THE COURT: Good. That's good. You should do that, but here on a preliminary injunction motion --

(Laughter)

THE COURT: Okay. All right. That's fair. That's fair. I understand that. But that -- okay.

MR. WEINGARTEN: Or get -- I don't want to just give

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1 into the full foreclosure theory. That's another artificially
2 high burden that the Defendants have tried to put on the
3 government.

4 Yes, one theory is they might have to -- the PlayStation
5 user just has to go get an Xbox. That's one theory.

6 The other types of harm, though, arise from all the myriad
7 ways in which platform holders or owners contract to use the
8 content to push their platforms.

9 **THE COURT:** Okay. So let's stop. Let's start with
10 full foreclosure -- right? -- which is what one of the things
11 that Professor Lee focused on. So what is the actual -- and we
12 heard a lot about his input into his model and the 20 percent
13 shift, I guess.

14 What data was he looking at? And I have in front of me
15 all of -- his declaration. What data was he looking at that he
16 came up with that 20 percent figure?

17 **MR. WEINGARTEN:** I'm going to phone a friend,
18 Your Honor.

19 **THE COURT:** Yes, you may phone a friend, absolutely,
20 and the friend can even speak.

21 (Pause in proceedings.)

22 **MR. WEINGARTEN:** This is my colleague Merrick Pastore,
23 Your Honor.

24 **THE COURT:** Yes.

25 **MR. PASTORE:** Sorry. Could you please repeat the

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1 question?

2 **THE COURT:** Well, I want to know what data, actual
3 data, was he looking at. And I'll just tell you, Dr. Bailey
4 actually looked at real-world, this is what is happening data.
5 Did he analyze that data?

6 **MR. PASTORE:** Sure. Well, Dr. Lee also analyzed
7 real-world data, Your Honor.

8 To look at the share shift, Dr. Lee had to look backwards
9 to see in Generation 8, which you have a lot of data for, how
10 various Call of Duty games may have affected that competition
11 if they had been taken away.

12 The reason you do that is because that analysis is
13 backward looking. You know, there's not much data for
14 Generation 9, especially because of the supply shortages that
15 happened.

16 **THE COURT:** Okay. So what is the generation data that
17 he looked at? What is it that he looked at?

18 **MR. PASTORE:** He looked at both generations so --

19 **THE COURT:** No, no, no. Yeah, but what about -- what
20 is the data, the generation data, what is it that it shows?

21 **MR. PASTORE:** Sales data.

22 **THE COURT:** Sales data.

23 **MR. PASTORE:** Sales data for Generation 8.

24 **THE COURT:** Sales data of just the number of
25 PlayStations and Xboxes sold?

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1 **MR. PASTORE:** Per-unit sales data for games.

2 **THE COURT:** Okay. But -- and how from that did he
3 extract the people -- the players that would leave PlayStation
4 or maybe they'd keep their PlayStation but the next iteration
5 that came out, they would buy an Xbox? That's what he's
6 saying; right?

7 **MR. PASTORE:** Well, he also used the same telemetry
8 data that Dr. Bailey looked at; but in addition, you know, he
9 used the per-unit game sales. And I think, you know --

10 **THE COURT:** Where in his report do I see how he used
11 that same data that Dr. Bailey looked at?

12 **MR. PASTORE:** I don't have the report in front of me.
13 If one of my colleagues could give it to me.

14 (Pause in proceedings.)

15 **MR. PASTORE:** Could you repeat the question one more
16 time?

17 **THE COURT:** Well, I'll just say Dr. Bailey writes
18 62 percent of all PlayStation owners don't play Call of Duty at
19 all so they're not going to move. They're not -- the
20 foreclosure won't affect them; right?

21 **MR. PASTORE:** 62 percent of all PlayStation users do
22 not play Call of Duty at all?

23 **THE COURT:** Right.

24 And then of those that do, most don't play very often.
25 Let's see if I can find it.

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1 Can you direct me to -- do you know what slide I'm
2 referring to?

3 **MS. WILKINSON:** I do, Your Honor, in theory, but let
4 me take a moment to look for that.

5 (Pause in proceedings.)

6 **THE COURT:** I think it was Slide 15. I'm not going to
7 give you numbers, I guess. Maybe we talked about that
8 62 percent before.

9 But it would be -- well, if you look at Slide 15, it's not
10 that many PlayStation players who play a lot of Call of Duty a
11 year.

12 **MR. PASTORE:** I'm sorry, Your Honor. I do not have
13 the slides in front of me.

14 **MS. WILKINSON:** Here you go.

15 **THE COURT:** I'm sure that somebody does there.

16 And so I'm trying to get how you get to that those people
17 will buy an Xbox because Call of Duty is so important to them.

18 **MR. PASTORE:** Yes, Your Honor.

19 **THE COURT:** How do you decide that Call of Duty is so
20 important to them? It is to some people.

21 **MR. PASTORE:** Yes.

22 **THE COURT:** Some.

23 **MR. PASTORE:** Some.

24 **THE COURT:** But how does he figure out that that -- to
25 get to that percentage number that they would actually do the

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1 Xbox? What data is he relying on?

2 **MR. PASTORE:** Well, I'd encourage Your Honor to look
3 at the declaration of Mr. Jim Ryan in his testimony where he's
4 very clear about the financial impact that Call of Duty has on
5 the PlayStation platform.

6 **THE COURT:** That's not my question. My question is
7 how your expert, Dr. Lee -- he did a foreclosure model --

8 **MR. PASTORE:** Yes.

9 **THE COURT:** -- right? And the foreclosure model
10 inputted that 20 percent number.

11 **MR. PASTORE:** Yes.

12 **THE COURT:** -- which represented the share -- another
13 number. Not all PlayStation users; right?

14 **MR. PASTORE:** Yes.

15 **THE COURT:** Yeah.

16 **MR. PASTORE:** Sorry. Sorry if I misunderstood your
17 question. I think I get it now.

18 So that 20 percent number -- I'm sorry -- that 20 percent
19 comes from two main inputs. The first is the LTV, the
20 five-year expected lifetime revenue of a new Xbox owner. And
21 as we presented to Your Honor, you know, that LTV is for the
22 average Xbox user. I'm being careful with the numbers here.

23 And as we showed, Your Honor, through, I think, a
24 demonstrative, if you remember, with the different colors, Call
25 of Duty games compared to the average AAA title, they sell

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1 quite a lot. They come out every year around October or
2 November, and they're at the top of the charts. Even Call of
3 Duty Vanguard, which Activision has time and time again said it
4 was a disappointment, that was the number one selling game the
5 year it came out. That's a disappointment for them. That's --
6 still for every other company that's a huge win.

7 **THE COURT:** I'm just saying people who only play Call
8 of Duty, let's say 20 hours a year, are they included in that
9 20 percent figure? You can point me to where in his report I
10 should look.

11 **MR. AKLEMAN:** Jim Akleman on behalf of the Government.

12 So his report is quite long and it's actually helpful if
13 Dr. Lee can explain it himself, but we'll try to do our best to
14 explain economic evidence to you.

15 So if you look at Footnote 806 of his report, which is --
16 it's on page 210 of PX5000, Dr. Lee explains some of the -- how
17 he has sort of got to this rate of people that start using --
18 that might switch; right?

19 So he looks at the universe of people that play Call of
20 Duty and used a variety of data from, my understanding is, both
21 from the Gen 8 share model -- remember, Dr. Lee went back and
22 looked at how gamers actually behaved in response to changes
23 under whole generation --

24 **THE COURT:** Correct me if I'm wrong, that Footnote 806
25 assumes the 20 percent number. I'm trying to figure out how

1 you get to the 20 percent number.

2 **MR. AKLEMAN:** So I don't think it's -- respectfully, I
3 don't think it's correct to say he assumed that it was
4 20 percent. The 20 percent is based on the inferences that
5 were drawn both from the prior generation, the share model,
6 which looked at how people behaved in Gen 8, and then you
7 applied that behavior to Gen 9 to try to predict what people
8 would do in Gen 9.

9 And the reason is because we don't have a ton of data of
10 Gen 9 today; right? So the 20 percent conversion rate, that's
11 actually applied in his second model, which his foreclosure
12 model.

13 **THE COURT:** Right.

14 **MR. AKLEMAN:** And that's intended to predict whether
15 Microsoft would actually have the incentive to withhold -- and
16 I apologize, I hope I'm not saying anything confidential.

17 The idea is that would be intended to predict whether
18 Microsoft would actually withhold data. So, again, he used the
19 modeling of what happened in the past to help predict what
20 would happen in the future.

21 **THE COURT:** I understand that.

22 **MR. AKLEMAN:** It's not just based on, for example,
23 just guessing what the number is.

24 **THE COURT:** No, I understand. I'm just trying to
25 figure out what was the data that was in that -- that model;

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1 right?

2 Because, for example, Dr. Bailey showed evidence that the
3 number of PlayStation Call of Duty users that play a lot is
4 actually a pretty small number versus all PlayStation users;
5 right? So --

6 **MR. AKLEMAN:** Right. So --

7 **THE COURT:** And also in terms of revenue, it's not the
8 biggest revenue driver for PlayStation.

9 **MR. AKLEMAN:** You're saying Call of Duty is not the
10 biggest revenue driver on PlayStation?

11 **THE COURT:** Right.

12 **MR. AKLEMAN:** So I think this is what's tricky about
13 this case, is that you have to look at the specific data for
14 each game. You can't just say "I need either the largest game
15 or" -- like, you actually have to calculate, which is what
16 we've tried to present, you have to actually calculate what the
17 effect of withholding that game would be. That's -- that's
18 really -- we can't just say this is the largest game or --

19 **THE COURT:** No. I guess maybe you can just tell me in
20 sort of plain English why would those -- that particular
21 20 percent number buy the Xbox? Like, what is it about Call of
22 Duty that they would abandon their console of choice and buy
23 the Xbox?

24 **MR. AKLEMAN:** So the way to think about this --
25 right? -- is that a consumer -- and, again, I'm not an

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1 economist, but I'll do my best here -- a consumer, let's say
2 they spend \$70 on Call of Duty; right? There is a surplus
3 that's associated with that. Like, if someone is spending \$70
4 on Call of Duty, they likely value it a much more than \$70, and
5 so that value that they ascribe to having the ability to play
6 Call of Duty or another Activision game, to be clear, like
7 Diablo as we heard testimony about yesterday is quite vague,
8 that loss surplus, the benefit that they would get from having
9 a game that they really like, so once they lose that because
10 they no longer have access to the game on the platform, they
11 then have to make a choice; right?

12 And so one of their choices is they can just forego that
13 benefit that they would have kept and they just lose that, and
14 so that's actually harm that would result from the transaction.

15 Another possibility that it can do is maybe they already
16 own another console, in which case they might just go buy, if
17 they -- if they're, for example, the rare number of people who
18 are multihomers on Xbox and PlayStation, they can just go and
19 buy on the other console. So there's not as much harm there.

20 And then, finally, the other option is -- well, there are
21 a few more, but just for simplification -- finally, they could
22 go and they could spend \$500 on an Xbox if they really, really
23 value Call of Duty, and they -- then they get access to Call of
24 Duty again on the platform that they didn't sort of intend to
25 choose.

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1 And just to sort of bring it back, that results in a share
2 shift from -- we heard a bunch of numbers. I don't know which
3 ones are confidential and which ones are not -- that results in
4 a share shift from PlayStation to Xbox.

5 And then this one is a little bit out of my depth, but my
6 understanding is that you can then use that share shift to
7 impute a -- a price change -- an implied price change.

8 **THE COURT:** I understand that. How do you figure out
9 between -- you say, well, those who don't switch, who don't --
10 who forego buying the Xbox and playing Call of Duty are harmed.
11 True. True. But you're using that to get to the foreclosure
12 incentive; right?

13 So what I need to know is: How do you calculate the
14 number of people that were -- because it has to be enough
15 people, you have to show enough people would switch to Xbox
16 such that Microsoft would have the economic incentive to
17 foreclose. If everyone would just give up on Call of Duty,
18 then they don't have the economic incentive to foreclose --
19 right? -- because it would actually cost them money.

20 So how do you figure out how many people would just give
21 up and how many people would then actually buy the Xbox?

22 **MR. AKLEMAN:** So that's based on -- and I'm not an
23 economist, again, but that's based on looking at the behavior
24 of players based on, for example, past exclusivity and looking
25 also at the sales behavior of Call of Duty, looking -- trying

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1 to figure out that -- remember that surplus that I was talking
2 about earlier? -- trying to figure out exactly how much they
3 value that. Because once you understand how much sort of the
4 average -- it's not really the average, but how much that
5 certain set of consumers --

6 **THE COURT:** It's not the average; right? It's the
7 exceptional consumer.

8 **MR. AKLEMAN:** Exactly, right.

9 So the people that are actually going to switch, that's
10 sort of the top end of the people that play Call of Duty. So
11 it's people that value it exceptionally highly; right?

12 But some people that are sort of on the lower end, they're
13 just -- they may not do anything; right? They may just stop
14 playing it because they don't sort of value it enough to
15 switch, and that's sort of -- that's the math exercise that's
16 going on here and that's what Dr. Lee, who I'm sure could
17 explain this much more ably than I could, has calculated.

18 **THE COURT:** So you're saying that was based, then --
19 for example, Dr. Bailey showed us data as to the number of
20 hours of played on Call of Duty; right? You would expect that
21 someone only plays 10 hours a year less likely to switch than
22 someone who plays 200 hours a year.

23 **MR. AKLEMAN:** Right. The -- I think the data that --
24 as I understand it, the data that Dr. Bailey was presenting are
25 more along the lines of inputs into the actual modeling that

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1 Dr. Lee did; right? So I don't -- I don't know what the exact
2 number is, but I guess I don't personally dispute whatever the
3 telemetry data shows about how much people play Call of Duty.

4 But you can't just stop there. Then you have to go and
5 figure out: What does that tell me about the actual behavior
6 of people that are playing the game? How many of them --
7 remember -- I apologize -- it's how many of those people are
8 actually going to switch --

9 **THE COURT:** Yes.

10 **MR. AKLEMAN:** -- because they value it exceptionally
11 highly?

12 So, for example, the people -- I haven't looked at them --
13 this calculation myself, but I would imagine that the people
14 that play a lot more are far more likely to switch than those
15 people that don't -- that don't play very often. So that's --
16 that's telemetry data, that's an input into the foreclosure
17 calculation, but it's not -- you can't just look at that data
18 and kind of --

19 **THE COURT:** No, no, no. That's what I'm trying to
20 confirm, that it was, in fact, input into Dr. Lee's foreclosure
21 model.

22 (Pause in proceedings.)

23 **MR. AKLEMAN:** That's correct, yes. He used telemetry
24 data. I apologize. Was that just the question?

25 **THE COURT:** Well, no, that's okay.

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1 Did you want to say something, Ms. Wilkinson?

2 **MS. WILKINSON:** I do, Your Honor. I'm not an
3 economist, but I think I can explain it.

4 This 20 percent is an input, as you're suggesting. It
5 doesn't come out of the model like the 5.5 percent share shift
6 does. That 20 percent he came up with as an estimate. There
7 is no basis, he doesn't calculate it from another model or
8 another --

9 **THE COURT:** I thought it came from the share/demand
10 model.

11 **MS. WILKINSON:** No. He used that model first.
12 Dr. Carlton told him what was wrong, and he explained in his
13 rebuttal report, no, they're separate. They're just kind of a
14 check on the outputs, not on the inputs.

15 And he doesn't have any basis to show --

16 **MR. PASTORE:** I want --

17 **THE COURT:** It was a check on the output because it
18 was higher. It was 8.9 percent so, therefore, the 5.5 percent
19 share shift is conservative.

20 **MS. WILKINSON:** Right, but not the input of the
21 20 percent. That goes to exactly your question, which is: How
22 many people convert? Not how many people want Call of Duty
23 but, to your point, how many people would actually go buy the
24 Xbox? And he makes that number up.

25 And you -- I think I tried to point out during my

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1 examination, but if you look at PX5001 on page 76, he shows a
2 chart, because that is an input, of how if you change that
3 input, you get a totally different answer.

4 **THE COURT:** No, I remember that. I'm just --

5 **MS. WILKINSON:** But that's what I'm saying, is he's
6 not -- he doesn't say that he can point to a calculation that
7 he did to get the 20 percent. I thought that's what you were
8 asking.

9 **THE COURT:** That is what I'm asking. So maybe you can
10 show me where --

11 **MR. PASTORE:** Sorry. I'm sorry for --

12 **THE COURT:** -- how you calculate -- no, that's okay --
13 how you calculate that. I know you probably didn't even expect
14 to be up here, and you're doing great.

15 **MR. PASTORE:** I appreciate that.

16 (Laughter)

17 **MR. PASTORE:** Your Honor, I really appreciate that.
18 Thank you.

19 No, I didn't expect to be up here, but I also can try to
20 help you understand --

21 **THE COURT:** Yeah, no, I'm glad.

22 **MR. PASTORE:** -- how we get here.

23 I just -- the reason I jumped in is because Dr. Lee did
24 not just make up the 20 percent.

25 **THE COURT:** Okay. So show me in the report where I

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1 can read where it came from.

2 **MR. PASTORE:** Given that it's a very long report, I'm
3 looking to my colleagues for a little bit of help on the exact
4 page number, but --

5 **THE COURT:** Okay. Well, maybe -- so why don't we look
6 at. So that's a question that I have because that 20 percent
7 figure is sort of critical -- right? -- to your argument, which
8 is notwithstanding everything Microsoft said, notwithstanding
9 the agreement that they offered, notwithstanding their
10 agreement with Nintendo, they have an economic incentive to
11 make Call of Duty exclusive.

12 **MR. PASTORE:** Yes.

13 **THE COURT:** And as we all agree, that's what they want
14 to do, make money, and, therefore, they -- there's a likelihood
15 that they would do that. So that's why I'm honing in on that.

16 **MR. PASTORE:** Yes, no, I totally appreciate that. I
17 think I'll go back and get the exact answer; but from my --
18 and, again, I'm not an economist. I try my best. I did my
19 undergraduate in economics so I have a little bit of an
20 understanding.

21 **THE COURT:** Well, you're ahead of me then.

22 **MR. PASTORE:** But I'm not near -- I'm nowhere close to
23 Dr. Lee -- to Professor Lee.

24 But the 20 percent -- first of all, you know, we found a
25 range, 15 to 25 percent. So the 20 percent is in the middle of

1 that range.

2 **THE COURT:** Right. But --

3 **MR. PASTORE:** Sorry.

4 **THE COURT:** -- we saw that if it's 15 percent, the
5 same incentive is not there --

6 **MR. PASTORE:** Let me explain that very quickly.

7 **THE COURT:** -- potentially. Potentially.

8 **MR. PASTORE:** So two main inputs go into finding this
9 20 percent. The first I think I mentioned a bit earlier, which
10 was the LTV, the five-year calculation of your average Xbox
11 user, which Microsoft uses in the ordinary course. This is
12 their numbers. They calculate this.

13 And the other main input is the share shift. Sorry. I'm
14 so sorry. The other main input is the share shift, that we use
15 Generation 8 data to approximate.

16 Now, economics is, unfortunately -- you know, it's -- we
17 do the best with the data we have. And in this case to try to
18 look at what exclusivity might do, looking for this point, the
19 share shift point, looking back on Generation 8 data, you have
20 a much larger set. You have about seven years of data from
21 last generation where Call of Duty, as you saw in the graph,
22 was a very, very popular game.

23 So understanding that it might -- at first blush, it might
24 be, "Oh, why are you looking at Generation 8 data here and
25 Generation 9 data here," for this one input, this expected

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1 potential share shift, that's where we look at data.

2 **THE COURT:** And when you're looking at the generation
3 day data, are you looking at how many hours people play Call of
4 Duty in a year to come up with that share shift?

5 **MR. PASTORE:** Well, I believe it's unit sales data,
6 which, you know, if you buy Call of Duty, that's \$70, \$60.

7 **THE COURT:** Yeah, but we know that some people play
8 5 hours a year and some people play 200 hours a year, and
9 you're not going to tell me that someone that plays 5 hours a
10 year is likely to buy that Xbox just because Call of Duty is
11 exclusive to Xbox; right?

12 **MR. PASTORE:** Yeah, that's fair enough.

13 And I do want to emphasize that the 8.9 I think -- I
14 don't -- sorry.

15 **THE COURT:** No, that was --

16 **MR. PASTORE:** Is that public? I'm sorry.

17 That number --

18 **THE COURT:** It's all hypothetical.

19 **MR. PASTORE:** Yeah, see, this is only one
20 consideration. And just to -- I'm sorry to zoom out for a
21 second, but Dr. Lee, you know, these are -- Professor Lee,
22 these are very big reports. These quantitative models are one
23 of the things that he's looking at along with qualitative
24 evidence, along with other, you know, Microsoft normal course
25 documents that they look at for share shift.

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1 **THE COURT:** We'll get that, but my question is about
2 this foreclosure --

3 **MR. PASTORE:** Yes.

4 **THE COURT:** -- model; right? Right? Because that's
5 important to Microsoft having the economic incentive.

6 **MR. PASTORE:** Of course.

7 **THE COURT:** That's a mathematical calculation.

8 **MR. PASTORE:** Yes.

9 **THE COURT:** It makes more sense to take Call of Duty
10 exclusive than it does to leave it on all the platforms; right?

11 **MR. PASTORE:** Yes.

12 **THE COURT:** I mean, that's -- that's the nub of it.

13 **MR. PASTORE:** Yes. And just what I'm trying to get
14 across is, even though we have this 8.9 percent, that's just
15 one of the percentages he looks at. You know, we see other
16 share shift figures from Microsoft documents that are
17 consistent with this number. They're a little lower but, you
18 know, with -- with the impact of Call of Duty, you know, its
19 sales, its popularity, I know that --

20 **THE COURT:** It is very popular?

21 **MR. PASTORE:** Yes.

22 **THE COURT:** It's sold a lot. A lot of people buy
23 games and they play them once or twice, and then they never
24 play them again; right? They play them with their friend and
25 then they never play them again.

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1 So I guess I'm trying to figure out -- maybe I'm wrong
2 about that, but I'm looking at the data that Dr. Bailey said,
3 that a lot of people don't buy it and don't play it very much.

4 **MR. PASTORE:** Yes. Yeah, and just, again, to consider
5 back to Mr. Jim Ryan's declaration where he discusses, you
6 know, how big Call of Duty is on the PlayStation -- is this
7 public?

8 No. So sorry. So I would want to turn Your Honor's
9 attention to paragraph 28 of Mr. Ryan's declaration about the
10 fourth sentence where it starts "In 2021." I won't say
11 anything below -- after that.

12 (Pause in proceedings.)

13 **THE COURT:** What's the RX number?

14 **MR. PASTORE:** Do you know? It's PX8001, Your Honor.

15 **THE COURT:** Oh, it's not in this one.

16 **MR. WEINGARTEN:** So, Your Honor, I think --

17 **THE COURT:** Is what he's saying based on the number of
18 hours played? That's all I'm asking. I'm just wondering.

19 **MR. WEINGARTEN:** Paragraph 28 looks -- are you asking
20 about -- when you say "he," Your Honor, do you mean Mr. Ryan or
21 Dr. Lee?

22 **THE COURT:** You're relying on Mr. Ryan now. He's
23 telling me to look at paragraph 28 of Mr. Ryan.

24 **MR. WEINGARTEN:** Mr. Ryan paragraph 28 is about hours.

25 **MR. PASTORE:** It's about --

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1 **THE COURT:** Okay.

2 **MR. WEINGARTEN:** And then I just want to direct your
3 attention --

4 **THE COURT:** But can I -- can I ask you, then, about
5 Dr. Bailey's demonstrative? I didn't hear any dispute with
6 that. Is that accurate?

7 **MR. ANSALDO:** Which demonstrative, Your Honor?
8 Alex Ansaldo for the Federal Trade Commission.

9 **THE COURT:** Number --

10 **MS. WILKINSON:** I think you said 15, Your Honor.

11 **MR. ANSALDO:** Number 15?

12 **MS. WILKINSON:** Uh-huh.

13 **MR. ANSALDO:** I don't think we have a specific dispute
14 with the information in this demonstrative.

15 **THE COURT:** Okay.

16 **MR. ANSALDO:** I think Dr. Bailey acknowledged, as
17 Professor Lee showed, that the more that the gamers spent --
18 more time gamers spend on a game, so that people that are to
19 the right of that chart spend a lot more money than the people
20 that are in the middle or to the left of that chart --

21 **THE COURT:** Right. No, but --

22 **MR. ANSALDO:** -- in that game.

23 **THE COURT:** Yeah.

24 **MR. ANSALDO:** And there was one other thing I wanted
25 to address. This is in this next -- it's on Demonstrative 17,

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1 which is confidential.

2 **THE COURT:** Yes.

3 **MR. ANSALDO:** This demonstrative shows -- or purports
4 to show the average spend per gamer, not the total value of
5 that whole population of gamers to the platform.

6 **THE COURT:** Yes.

7 **MR. ANSALDO:** So there are many more Call of Duty
8 gamers than there are of the games that are to the left of it
9 in this chart. So this chart doesn't accurately reflect the
10 total value of the franchise to a platform.

11 **THE COURT:** That's the money spend? Oh, but it
12 doesn't include the platform purchase.

13 **MR. ANSALDO:** Well, it doesn't tell you how many --
14 how many gamers there are playing that game. So this chart was
15 based on Dr. Bailey's cutoff of 50 hours per year as a
16 franchise gamer and it's the average of those gamers.

17 **MS. WILKINSON:** Your Honor, to be clear, it's the
18 money spent, though, as you're pointing out. It's not the
19 hours spent. There's a minimum, but that can't tell you how
20 many hours the Call of Duty players play and it doesn't fold
21 into what you're asking, which is: How do you determine which
22 of those people who play more will actually switch?

23 And I don't -- I mean, we've asked Doctor -- or
24 Professor Lee in his deposition. We've read his reports. We
25 don't see any calculations there.

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1 **THE COURT:** Do you have something in his deposition
2 that you -- you're not going to do that, but why don't you look
3 while you're there. Everybody has big teams. Find me where in
4 his deposition you say I can look to see that there is --

5 **MS. WILKINSON:** Yes. It might not surprise you --

6 **THE COURT:** You say --

7 **MS. WILKINSON:** -- that he was not -- he gave long
8 answers and it was sometimes hard to --

9 **THE COURT:** You just told me --

10 **MS. WILKINSON:** Yes.

11 **THE COURT:** -- that in his deposition you asked.

12 **MS. WILKINSON:** No. I said we don't have any answers
13 for that. We tried. We don't have any answers.

14 **THE COURT:** You can even point to me to where you
15 tried.

16 **MR. WEINGARTEN:** If I may, Your Honor.

17 **THE COURT:** Yes.

18 **MR. WEINGARTEN:** I apologize. It took some time.
19 Dr. Lee's reply report, paragraph 207, Dr. Lee in the reply
20 report says: Professor Carlton's first critique is that the
21 Xbox conversion rate that I use is too high. I believe that is
22 directly responsive. The Xbox conversion rate is the
23 20 percent, and he says the first critique is that it is too
24 high but this critique is flawed and rests upon the incorrect
25 assumptions as follows:

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1 Paragraph 208 and Footnote 233, I believe, are where
2 Dr. Lee shows the support for the 20 percent. What I suspect
3 is tripping everybody, potentially, respectfully, up is that
4 the 20 percent conversion rate seems to be calculated and
5 converted into an equivalent percentage points of people who
6 are new to the Xbox.

7 So he says (as read):

8 "The 20 percent conversion rate that I used by
9 showing the foreclosure of Call of Duty '25 from
10 PlayStation results in an increase of NTX users that's new
11 to Xbox users equivalent to 5.5 percentage points of the
12 sales."

13 So I think --

14 **MS. WILKINSON:** That is --

15 **MR. WEINGARTEN:** Well, I don't -- the scoffing --

16 **MS. WILKINSON:** I think, Mr. Weingarten, he's saying
17 "I put 20 percent into the model" --

18 **MR. WEINGARTEN:** No.

19 **MS. WILKINSON:** -- "and it produced 5.5 percentage
20 share change." He's not saying the model produced 20 percent.

21 **MR. WEINGARTEN:** I --

22 **THE COURT:** Okay. All right. I see. You're
23 directing me to those paragraphs and to --

24 **MR. WEINGARTEN:** Footnote 233.

25 **THE COURT:** Footnote 233. Thank you. That's what I

1 wanted to know.

2 **MR. WEINGARTEN:** Thank you.

3 **THE COURT:** Great.

4 **MR. PASTORE:** Thank you.

5 **THE COURT:** Okay. So I think I under -- so then let's
6 also talk about the relevant market, then, for the Gen 9.

7 And I guess where I'm struggling there is because you can
8 play a lot of these games on the PC and the Nintendo console,
9 and so can you give me a case in which a relevant market didn't
10 include something like an input -- I guess we call the game an
11 input here, I don't know -- that they're playing? Like, I can
12 play, not yet, on -- maybe never you would say, on the
13 Nintendo, but I can play on my PlayStation, my PC, and my Xbox
14 simultaneously anywhere in the world against each other but,
15 yet, you say that PC is not part of the market.

16 **MR. WEINGARTEN:** Very -- this one is pretty
17 straightforward, although my colleagues will jump up if I screw
18 this one up.

19 The question is the consumer's choice and the set of
20 products that the consumer can reasonably substitute. The
21 consumer in this example is looking for a video game console in
22 our hypothetical monopolist test; right?

23 The hypothetical monopolist owns the Switch and the
24 PlayStation and the Xbox, and our consumer goes to buy one of
25 those things. We're talking about the broader video game

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1 market here. It doesn't include PCs, and I'll explain why.

2 The hypothetical monopolist says: I'm going to take the
3 price up 5 percent from \$500 to whatever 5 percent of that,
4 10 percent, 550. Our hypothetical consumer does not say:
5 Fine. I'm not going to pay your 550 by going off to buy a
6 \$1500 PC.

7 **THE COURT:** What if they already have the PC?

8 **MR. WEINGARTEN:** If they already have a PC?

9 **THE COURT:** Yeah. They don't have to buy it. In
10 other words -- in other words, why isn't -- everybody,
11 particularly in 2023, and I would also guess that particularly
12 with people who play Call of Duty, are likely to already own a
13 PC; right? I mean --

14 **MR. WEINGARTEN:** Right, although I -- yes. Yes,
15 and --

16 **THE COURT:** So they don't have to buy one.

17 **MR. WEINGARTEN:** Right. So the question, though, is
18 twofold on that. One is, the gaming PC is a special kind of
19 PC. It is not a run-of-the-mill PC. A run-of-the-mill that
20 you go and you get the bargain-basement \$200, \$400, \$500 PC is
21 not a gaming PC.

22 **THE COURT:** I get that, but -- and maybe I'm biased in
23 the world that I live in -- right? -- and the world we've all
24 lived in during the pandemic where everybody went home,
25 everybody did their work from home, and nobody did it on a

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1 bargain-basement PC. Everybody had a 1000, \$1500 PC.

2 Do we have --

3 **MR. WEINGARTEN:** The test is asking about the purchase
4 decision. So we're assuming someone is looking to buy this
5 console, and will they be able to defeat the price of the
6 console by making an alternate purchase. It's not defeat the
7 price because you don't really need the product because you
8 already have something.

9 **THE COURT:** So I understand that. I'm just in real
10 world I'm trying to figure out how that works. Like, why
11 doesn't the existence of being able to play on the PC, which
12 you already have, maybe not quite the same quality I think you
13 would say, but you already have, why wouldn't that have some
14 sort of influence and downward pressure on the price of the
15 Xbox?

16 Because you raise it to -- I know the snip is a low
17 number, but you raise it to a thousand dollars, "Hey, forget
18 it. I'm going to play on the PC that I already have."

19 **MR. WEINGARTEN:** Right. So for any given market, if
20 we assume that the price increase is vast, almost anything can
21 be added in as a substitute, and so that's why the test focuses
22 more narrowly. You could say: Why aren't, you know, \$500
23 Italian shoes a substitute for \$20 Texas?

24 **THE COURT:** Right. It's the significantly small.

25 **MR. WEINGARTEN:** That's why we do that, because

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1 everything eventually becomes a substitute if the price goes
2 through the roof. I think my colleagues will nod if I say
3 "Cellophane Fallacy." Are some of them nodding? Maybe some of
4 them are nodding.

5 But there's a case about this where if you take the price
6 so high that airline tickets -- or instead of competing among
7 airlines, you said, actually, buses are in the market because
8 if I took the prices of buses up to 500 bucks a ticket, they'd
9 compete with airlines.

10 **THE COURT:** So we'll stick to the small percentage.
11 I guess are you saying that as a matter of economics, you can't
12 take into account the fact that somebody may already own the
13 particular platform that they need?

14 **MR. WEINGARTEN:** I think as a matter of economics,
15 again, the point is the purchasing decision and whether, for
16 the purposes of the hypothetical monopolist test, can a product
17 outside our proposed market constrain this hypothetical
18 monopolist. That's -- it's a construct, but that's the
19 construct.

20 **THE COURT:** Right.

21 **MR. WEINGARTEN:** And so the hypothetical monopolist
22 who owns all three consoles in the broader console market, is
23 that hypothetical monopolist going to be unable to raise prices
24 in a small but significantly significant way for a period of
25 time because there's a PC that costs \$1500? No.

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1 **THE COURT:** No, not if they have to buy the PC. But
2 what if -- again, I'm sorry to go back, and that's what I'm
3 struggling with. I get it --

4 **MR. WEINGARTEN:** I understand, Your Honor.

5 **THE COURT:** -- if you had to buy it, that makes
6 perfectly good sense, if it was a different high-end console up
7 there, but we're talking about something that, maybe we're just
8 in unique land, that people own.

9 **MR. WEINGARTEN:** I think the question here is: It's
10 not about an actual purchase decision; right? Of course,
11 Your Honor, if someone owns a PC already, they can do the game.
12 They don't even need the console in theory.

13 But I'm being told if they already own a PC and a
14 console... So if they already own it, but that's not -- the
15 question is not what is the actual purchase decision for
16 someone who owns it. The question is: How can we tell if some
17 products are reasonable substitutes for each other? And the
18 way we can tell is we start drawing circles around the
19 products; and when we get to a circle where the price of those
20 products can be increased and something outside the circle
21 won't constrain it, we've got a circle that's a good relative
22 market to think about effects.

23 **THE COURT:** No, I understand that. I guess I'm just
24 trying to say but why? Why can we not consider the fact
25 somebody -- are you just telling me just -- and I'm not the

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1 economic expert so I -- I'm sorry, if I come across as dense.

2 I'm -- just as a practical matter, it just seems to me,
3 that if you have a PC and you can play the games on the PC,
4 that's going to have some constraint on the console prices
5 because the people making the console knows as soon as we go up
6 a little bit, that may make some people just say "Forget it.
7 I'm not going to buy that new console. I'm just going to play
8 on the PC that I already own."

9 **MR. WEINGARTEN:** I have two answers; one law, one
10 fact. The law answer is: I think the way the test has been
11 defined is the way I've been trying to state it under the law
12 of how the courts think about a hypothetical monopolist test.
13 So I'm comfortable about that, although that may be a copout.
14 But I'm not an economist either. I just do what the Courts of
15 Appeals and the District Courts tell me.

16 On the facts, the way I'm confident that the example
17 Your Honor is putting forward is not how we should think about
18 is that we have seen no evidence that Microsoft is benchmarking
19 the Xbox against a gaming PC in terms of price or even
20 performance.

21 There was no evidence by the Defense that Microsoft when
22 it was launching the X and S said, "How much do high-end gaming
23 PCs cost? 1500? We can price at 1499." There is no evidence
24 of that whatsoever, and so we feel confident that the close
25 competition that matters is among the Xbox and the PlayStation.

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1 **THE COURT:** So that, I agree. We haven't seen it.

2 And I'm -- I'm confident what you say as to the law, but can
3 you give me a case in which the law has said that in facts
4 similar to this? In other words, I think we're in a very
5 unique industry here and situation, and that's why maybe the
6 law hasn't addressed it.

7 **MR. WEINGARTEN:** Respectfully, I agree we're in a
8 unique situation; but, on the other hand, I'm fairly confident
9 this is not the first time that there's been a series of
10 products and then there's sort of an ultra-luxury version that
11 someone has claimed competes and, therefore, should be in the
12 market, and I will find you --

13 **THE COURT:** An ultra-luxury version that most people
14 already -- most people that play the game or do whatever
15 already own so they don't have to purchase it.

16 **MR. WEINGARTEN:** Right. I am told, Your Honor, that I
17 should mention the *Whole Foods* case.

18 **THE COURT:** Okay.

19 **MR. WEINGARTEN:** So that is D.C. Circuit 2008.

20 **THE COURT:** The whole paycheck.

21 **MR. WEINGARTEN:** I'll get you -- can we get an F.2nd
22 cite on there?

23 The *Whole Foods* case, Your Honor. It's in our reply in
24 support of the preliminary injunction motion.

25 **THE COURT:** Okay. I can look there.

1 **MS. WILKINSON:** Your Honor, may I dress that when
2 you're ready?

3 **THE COURT:** Of course.

4 **MS. WILKINSON:** First of all, the reason you're asking
5 your question is because you're right, we're not a horizontal
6 merger case. That's what that test is designed for.

7 Think of it, if you had all of these consoles in the same
8 market and Sony and Nintendo were merging. You want to see is
9 it going to get more concentrated or less and you're going to
10 see if they actually are competitors to see if they would
11 substitute.

12 Here, because it's a vertical merger, you're looking to
13 see where would they play the game if they lose the game. Not
14 the console. The game. So it is relevant to what you're
15 asking is: Would they go play it somewhere else and can they
16 get access to it elsewhere?

17 So they're trying to use a horizontal merger test to have
18 you calculate something in a vertical merger. If you look at
19 the cases, you'll see that they will mention that test and say
20 "But that's not really applicable in a vertical merger test,"
21 because that's not the question being asked.

22 **THE COURT:** We don't even have very many vertical
23 merger cases.

24 **MS. WILKINSON:** Right.

25 **THE COURT:** All right. Okay. I'll go back and look

1 at that case.

2 **MR. WEINGARTEN:** We'll just respectfully say if
3 Your Honor looks to our conclusions of law, I feel very
4 confident that there is no categorical distinction in the law
5 of the kind that counsel is drawing; that this test is only
6 applicable in a horizontal context.

7 **THE COURT:** The test actually, though, for product
8 markets, I do think there's case law that says it's sort of
9 very fact specific, detailed and there is no one test
10 necessarily of that.

11 **MR. WEINGARTEN:** Correct, but I just want to put a pin
12 in counsel's assertion that the HMT is not applicable in a
13 vertical merger. That is not the law as we understand it --

14 **THE COURT:** Okay.

15 **MR. WEINGARTEN:** -- and I direct Your Honor
16 respectfully to our conclusions.

17 **THE COURT:** Let me, then, ask you about Nintendo, and
18 I'm trying to figure out why Xbox offered that Xbox S at that
19 price point --

20 **MR. WEINGARTEN:** So --

21 **THE COURT:** -- but for the Switch.

22 **MR. WEINGARTEN:** So, Your Honor, that's what I was
23 driving at, respectfully, with my questions to Mr. Stuart this
24 morning.

25 This one is 299, the X -- or S, the Switch is 299, and I

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1 think Your Honor asked a question: Seems like they're aimed at
2 each other.

3 Now the questions and the testimony, in particular from
4 Mr. Stuart, demonstrated that at launch and even two years
5 later the price benchmark for the S was other Generation 9
6 consoles, and the strategy was: Let's get people into the
7 Gen 9 console market in an entry-point level. Not let's steal
8 share from Switch.

9 No documents about that and nothing from the defense on
10 cross of Mr. Stuart. They asked him about it, but no
11 documentary evidence; whereas --

12 **THE COURT:** Why are those two things inconsistent?

13 **MR. WEINGARTEN:** It doesn't necessarily have to be
14 inconsistent, Your Honor, but the strategy for the S in terms
15 of pricing was about getting an entry-level Gen 9 console.

16 **THE COURT:** That's because when they go to Best Buy
17 and it's on the shelf --

18 **MR. WEINGARTEN:** Right.

19 **THE COURT:** -- and we have got the PlayStation, the X,
20 the S, and the Nintendo Switch, probably -- I don't know, we
21 didn't hear any testimony about where it would be in
22 Best Buy -- and I'm looking at the Switch, but, look, I can get
23 this entry into the Gen 9; right?

24 **MR. WEINGARTEN:** Yeah, I hear you on that one,
25 Your Honor.

1 **THE COURT:** Yeah.

2 **MR. WEINGARTEN:** Again, it's noteworthy that when they
3 were pricing it, in their own documents you didn't see that.
4 So in November of 2020 when Microsoft is pricing it, I believe
5 the only evidence in the case on this is the evidence that we
6 put in this morning, that they didn't say "Let's triangulate
7 along the Switch." They said, "How do we get people into our
8 Gen 9 console world? And we'll do that with this entry-level
9 price point."

10 Like even if, Your Honor, there is some substitution
11 between the Switch at 299 and the S on the margins, we don't
12 think that's enough to defeat the market we've put forward
13 because of both the HMT, which we talked about, and all the
14 qualitative evidence about the competition and the Gen 9
15 console world X Switch.

16 And even if Your Honor was compelled to think, well,
17 because of that pricing, all of these are in a market, we're
18 still okay because --

19 **THE COURT:** I understand that argument. Okay.

20 Did you want to respond on the Nintendo?

21 **MS. WILKINSON:** I mean, Your Honor has it. People do
22 go into the store and they make one choice, and it is a
23 competitor. They have -- obviously Nintendo has some different
24 features, as you heard Mr. Kotick admit that he didn't quite
25 see as benefits, but the price is one of the most important

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1 things that consumers look at so it doesn't --

2 **THE COURT:** One thing.

3 **MS. WILKINSON:** One thing, but it is, as you say,
4 important to say, "Oh, I could get this newer console for 299."
5 And the fact that they're also priced off of the other devices
6 doesn't mean they're not a competitor for Nintendo. Both can
7 be true.

8 **MR. WEINGARTEN:** If I might add, one of the tricky
9 things, and I think it's something that Defense Counsel is
10 seizing upon here, is that competition is a pretty amorphous
11 concept. Lots of things compete and the function of the test
12 that the Courts of Appeals and the District Courts have derived
13 is to try and get down to what competition matters.

14 So in some sense, lots of things are competing all the
15 time in this space. You can play video games on your phone.
16 You can play a video game on the console. You can play -- what
17 matters is: Where is the locus of competition that the effects
18 of this deal will be felt?

19 That's why we do all these tests and look at *Brown Shoe*
20 factors, to try and figure out. So it is not sufficient to say
21 in a lay term or in a sort of casual term, there's competition,
22 people can walk into a store and see it. We're trying to get
23 to something a little bit more precise -- understanding that
24 these are complex questions and neither the economics nor the
25 law is clear -- trying to get to something so we can understand

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1 the effects of this transaction.

2 So I would just -- the casual idea that someone can walk
3 around and pick up one or the other, we can do better than
4 that, and the evidence that we've brought forward is better
5 than that, both on the HMT and all of the qualitative evidence
6 from pretty much from every witness in the case, that the
7 Switch is not the same as the Gen 9 consoles.

8 **THE COURT:** It is not the same. In many ways it's
9 better; right? Because you can actually still hook it up to
10 your TV and take it on the airplane.

11 **MR. WEINGARTEN:** So that's another point. It's a 299
12 price point, and I think Your Honor got at this. Nobody is
13 going to confuse paying 299 for a box that has no screen with
14 paying 299 for the portable screen.

15 So to say that they're competitors because of the price,
16 they don't do the same thing. That's -- the price is one
17 dimension of their competition; but among critical other
18 dimensions, including Mr. Spencer's testimony that they are
19 radically different form factors, the price is one piece. But
20 I would hate to say because they have a similar price, the box
21 that needs a TV is going to be someone's choice when they go to
22 the store and they have a portable device.

23 **THE COURT:** Well, which also can use a TV and play the
24 same games, many of the same games.

25 **MR. WEINGARTEN:** I would direct -- respectfully on

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1 that point, I would direct Your Honor to the charts. There's
2 bar charts in Dr. Lee's report. The content is quite
3 dissimilar between the Switch and the others.

4 Nintendo's whole strategy is about having Mario and Zelda
5 and the Family Friendly. Are there overlaps? Of course, but
6 very different content and consumer profile.

7 And I'll just -- not to belabor it, probably too late,
8 rather than taking our word for it, the best people who would
9 know what consumers think about and are looking to buy are
10 probably the folks at Microsoft who were setting the price when
11 the thing launched, and they didn't look at the Switch. So
12 that's, in our view, extremely probative.

13 **THE COURT:** What do you say to that, that there isn't
14 any evidence with respect to the S and the Switch pricing?

15 **MS. WILKINSON:** That is both, Your Honor, that they --
16 it can do -- or you can look at it either way. They both can
17 do the same thing, and there's a lot of overlapping games,
18 which I'm talking about -- I mean, which are on this chart I
19 want to refer you to; and as you point out, the Nintendo can do
20 more because you can take it with you. But there are also
21 pricing offputs in the market to look like it's an alternative
22 to these more expensive devices. So it's doing both.

23 **THE COURT:** Well, no, I understand that argument.
24 What Mr. Weingarten is saying is that there isn't any evidence
25 to support that argument.

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1 **MS. WILKINSON:** I don't think -- I don't think the
2 fact that they are pricing it off of this and they're not
3 saying there's actually a price comparison to these. You heard
4 that testimony. When you look at the documents from the
5 internal documents, it's not true that they don't compare
6 those. They do compare them.

7 **THE COURT:** Well, good. You can point those out in
8 your --

9 **MS. WILKINSON:** And most importantly I think,
10 Your Honor, on Dr. Bailey's charts on paragraph 88, which come
11 from her report at 71 and 72, it shows all the similar games
12 available on Xbox and Nintendo, and Counsel's just wrong. The
13 most popular games are on both.

14 You heard many people, including Mr. Kotick, say the
15 free-to-play games are the most popular games: Fortnite, then
16 one of the popular games that's pay-to-play is FIFA, Minecraft,
17 Apex Legends, NBA 2K22, Rocket League, Overwatch 2. You can go
18 down this list and you can see that there are -- these are on
19 both devices.

20 So your point that, you know, can people play most of
21 these games, they can. Do they also have another set of
22 choices on Nintendo? Of course they do just like they do on
23 PlayStation.

24 **THE COURT:** I think there was evidence that -- I won't
25 say the numbers, I don't know -- from Dr. Lee, though, that a

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1 lot of Nintendos were exclusive to Nintendo.

2 **MS. WILKINSON:** Like PlayStation. Like PlayStation.
3 They have many more -- both products have many more exclusives
4 than the Xbox.

5 **THE COURT:** But they weren't similar to PlayStation.

6 **MR. WEINGARTEN:** Yes. I mean, it has clearly been a
7 part -- I don't know if there's evidence on this in this
8 case -- but a part of the Nintendo strategy that you go for
9 Zelda and Mario, there's only one place to find Zelda and
10 Mario. The Nintendo.

11 I just want to add, Your Honor, if we're talking about
12 locus of competition and what matters, even if you look at
13 Dr. Bailey's demonstrative, for the purposes of this case
14 there's no dispute that Call of Duty, Modern Warfare 2, and
15 even the Sony God of War Ragnarök, the games that are driving
16 the competition that we care about because of the merger and
17 why we're here, those don't get played on Switch. That just
18 can't be, and that was pretty indisputable testimony as well.

19 **MS. WILKINSON:** If he's referring to Call of Duty,
20 Your Honor, we know that it was on the Nintendo devices
21 previously.

22 **MR. WEINGARTEN:** Many moons ago and many generations
23 of all Call of Duty ago.

24 **THE COURT:** Okay. All right.

25 **MS. WILKINSON:** Your Honor, can I clarify one issue

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1 that Counsel raised with you?

2 **THE COURT:** Yes.

3 **MS. WILKINSON:** When you were asking about ZeniMax and
4 asked him to find a game that was most similar to Xbox, he
5 mentioned Elder Scrolls. That is incorrect. There are two
6 Elder Scrolls games. One is online. It's called Elder Scrolls
7 online. That is a multiplayer game. It is on PlayStation
8 today. Microsoft has published new add-ons and separate games.
9 That is available.

10 The game he's talking about, Elder Scrolls 16 that's
11 coming out right now that, you know, projected release is 2026,
12 that's a single-player game. So it is not anywhere similar to
13 Call of Duty, which, as you know, is multiplayer and
14 multiplatform. So the one version of Elder Scrolls that is
15 similar is on PlayStation and always has been, at least for
16 these recent games.

17 **MR. WEINGARTEN:** There, I just want to -- I think this
18 is going to be a major point, it has been throughout the
19 briefing, which games are like Call of Duty, which games are
20 not like Call of Duty, and the briefing I thought joined the
21 issue quite well.

22 There are only a handful of titles in the history of the
23 gaming, as far as I understand it, that are multiplayer, cross
24 play, existing, and this might be the only one that's been the
25 subject of an acquisition in the last 20 years.

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1 So what we can show you is incentives and what the
2 incentives look like, and what we can show you is all the
3 evidence we brought about what Microsoft as a platform owner
4 will do, but the game -- the case, respectfully, is not going
5 to be decided on comparing multiplayer/non-multiplayer. The
6 case is going to be decided on understanding the economic
7 incentives.

8 **THE COURT:** Well, but we don't know have -- there's
9 economic incentives. Those economic incentives include your
10 brand; right?

11 **MR. WEINGARTEN:** Yes.

12 **THE COURT:** And if I recall when I asked Dr. Lee as to
13 whether his foreclosure model took into account the potential,
14 I think we all -- reputational harm; right? You've talked
15 about how -- and you point to Mr. Ryan and the loyalty of this
16 Call of Duty gamers, if their platform, preferred platform, is
17 taken away from them, there's going to be harm.

18 Like, we have whole trademark cases that are just about
19 reputational harm. So how does that factor in there into your
20 argument that Microsoft will, nonetheless, take it or is likely
21 to I should -- or has the incentive to take it exclusive?

22 **MR. WEINGARTEN:** So three things on that, Your Honor.
23 One is, it's a limitation of the model that you can't quantify
24 that kind of brand harm, and I think Dr. Lee also testified
25 that there are unquantifiable benefits as well. So the model

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1 misses some costs that are hard to quantify and misses some
2 benefits that are hard to quantify.

3 Number two, we saw what Microsoft faced with reputational
4 harm in the ZeniMax case, and the Court heard Mr. Hines'
5 apologies.

6 **THE COURT:** No. I'm sorry, you just told me you can't
7 think of another multiplayer, multiplatform game --

8 **MR. WEINGARTEN:** Right.

9 **THE COURT:** -- that was acquired, so actually we just
10 don't have anything to compare to.

11 **MR. WEINGARTEN:** So then I'll go to number three,
12 which is: Would there be incredibly damaging reputational harm
13 if the game were yanked from PlayStation; right?

14 So two thoughts on that. One is, harm to whom? If people
15 really want to play the game, they will still go to Xbox to
16 play it. They might grumble and be mad; but, you know, it's --
17 no one has proposed a theory that they'll just throw down their
18 controllers and stop playing altogether.

19 **THE COURT:** You don't think a boycott is possible?

20 **MR. WEINGARTEN:** I don't know.

21 **THE COURT:** You certainly see now I'm going way beyond
22 the evidence, but we certainly see consumers doing that; right?

23 **MR. WEINGARTEN:** I don't -- I don't know and it's
24 beyond the evidence.

25 But, more realistically, that's some sort of full

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1 foreclosure world that the Defense keeps wanting to paint us
2 into. But what about a world where Microsoft offers the best
3 new Christmas character to play on Christmas in Call of Duty
4 but it's only on Xbox? Or --

5 **THE COURT:** Okay. And where is the analysis that I
6 can say that that financial incentive enough would be -- would
7 be enough to make them do that; right? That's just not there.

8 And what players? Like, who? Like, what percentage of
9 the players that are out there would actually buy the Xbox so
10 they can get this Christmas character; right?

11 **MR. WEINGARTEN:** Right. So a couple of thoughts
12 there, Your Honor, respectfully.

13 One is, my least favorite answer in this venue is that's
14 part of what part three administrative proceeding may be
15 forced, that we have a chance to figure this out because it is
16 super-complicated.

17 My next better answer, given the venue we're in, is: It's
18 impossible and not really -- I don't think we could model
19 partial foreclosure because the methods of competition are so
20 myriad. It's infinite, as I think what we heard from
21 Mr. Kotick and from Sony, the co-promotion, the co-marketing,
22 there are infinite ways to make your content or your platform
23 seem valuable by investing in unique content.

24 But I respectfully don't think the answer can be to say:
25 Well, we'll throw up our hands and we can't figure it out. I

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1 think the answer is: Given all this behavior that we see in
2 the marketplace with competition for co-promotes and
3 co-marketing and Christmas players and all these things, will
4 Microsoft have an incentive to change the rules of the game or
5 slant those agreements or slant the promotions that matter
6 towards itself?

7 And all one has to believe to believe that is that they
8 are a profit-maximizing company; and if that's true, then have
9 we demonstrated a probability, we don't have to demonstrate a
10 certainty, but a probability that there's going to be a
11 lessening of competition?

12 That's -- that's the best answer I can give you because
13 there is no way to model, in a purely quantitative form, all
14 the myriad methods of competition and, on the flip side of
15 that, harm to competition.

16 **THE COURT:** Okay. And we're talking about Call of
17 Duty.

18 **MR. WEINGARTEN:** We are, Your Honor.

19 **THE COURT:** Right? We're talking about -- I mean,
20 it's -- okay. We'll get to that *Illumina* case, which is so
21 different in so many ways. We're talking about a video game, a
22 shooter. I think we saw an exhibit where it was the genre is a
23 shooter video game; that all this is for a shooter video game,
24 that we're concerned about the competition for this one shooter
25 video game.

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1 **MR. WEINGARTEN:** I will -- in all candor, I completely
2 understand where Your Honor is coming from. On the other hand,
3 our responsibility over on this side of the room -- and the
4 Government is not to make a value judgment about the market,
5 it's to protect competition in the market and --

6 **THE COURT:** How big is the market? I guess --

7 **MR. WEINGARTEN:** Billions, billions of dollars.

8 **THE COURT:** Of the game. But of the people that care
9 so much that they would actually switch, buy an Xbox that they
10 wouldn't otherwise buy.

11 **MR. WEINGARTEN:** So we're back to -- I don't want to
12 go back to --

13 **THE COURT:** That's okay. I understand. I understand
14 what you're saying.

15 **MR. WEINGARTEN:** -- but --

16 **THE COURT:** I appreciate your candor. I do.

17 **MR. WEINGARTEN:** -- it's not about just switching.
18 The harm to the PlayStation person -- right? -- who has Call of
19 Duty and they wake up after this deal closes and there's some
20 new character that's only on Xbox, it's not: Is that person
21 going to switch? It's: Has that person's experience, has the
22 value that they paid for been degraded in some way? They paid
23 499 for a PlayStation. Now because of this loss of ability to
24 have this cool thing, is it worth 488.50?

25 **THE COURT:** What do you say, though, to Mr. Ryan --

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1 **MR. WEINGARTEN:** Yes.

2 **THE COURT:** -- who said that -- what is it? -- Star
3 whatever --

4 **MS. WILKINSON:** Starfield.

5 **THE COURT:** -- that there was nothing anticompetitive
6 about Microsoft making that exclusive? Under what you just
7 said to me, that is anticompetitive.

8 **MR. WEINGARTEN:** So there's a distinction between
9 making an investment and figuring out how to make that
10 investment and helping a game develop and not, but I don't know
11 the basis for why Mr. Ryan was less upset about that one than
12 Call of Duty because --

13 **THE COURT:** Because he does the same thing.

14 **MR. WEINGARTEN:** They do. They do.

15 (Laughter)

16 **MR. WEINGARTEN:** And it is part of the -- Mr. Nadella
17 came, and Mr. Nadella said that's how the market is here;
18 right? It's all about exclusives. Everybody's doing it.
19 Microsoft may be more made because, despite \$70 billion, they
20 claim they don't have enough money to sort of compete with Sony
21 on these exclusives.

22 That's the market. It has benefits for players. I assume
23 if you're a video game player, ultimately if everybody's in a
24 kind of arms race with each other to get the content and make
25 it neat for their platform or their console, gamers benefit

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1 because now there's more neat things to play.

2 The concern here is, if you take away that competition and
3 now instead of people competing for the neat things to play, if
4 you want at least some of these neat things, you got to go to
5 the Xbox.

6 **THE COURT:** Okay. So then I think -- did you want to
7 say something?

8 **MS. WILKINSON:** No.

9 **THE COURT:** I think, then, that brings us right smack
10 into the agreements then or at least the Nintendo and the offer
11 to Sony; right?

12 **MR. WEINGARTEN:** Yes, although I got a note, if I may.
13 I apologize.

14 **THE COURT:** Of course.

15 **MR. WEINGARTEN:** I am reminded a good real-world
16 example, more extreme than my example of all the myriad
17 competition, Stadia. Google is a very large and successful
18 technology company. Mr. Zimring came. He testified they spent
19 a lot of money. They thought they got it right. They just
20 didn't have the content; and so because they didn't have the
21 content, that service died.

22 And then a consumer is deprived of that choice. That will
23 never be a choice for a consumer now to say "I want to play
24 video game X on Stadia." And that is another kind of concern
25 or harm that can happen. It's about innovation even the future

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1 products we haven't even thought about yet.

2 I just want to make sure I got that in. Thank you.

3 **MS. WILKINSON:** Can I address that, Your Honor?

4 **THE COURT:** Okay.

5 **MS. WILKINSON:** That was before this transaction and
6 Activision decided not to put its content on Stadia or allow
7 it. So now that, even when Activision is independent and they
8 make a decision not to put their content on certain platforms,
9 that's an answer to --

10 **THE COURT:** No, no, he's making a different point,
11 which is what he's saying is the concern -- the concern here is
12 that there will be less incentive for innovation. That's what
13 he's saying.

14 **MR. WEINGARTEN:** I'm not suggesting that there was --
15 I'm not suggesting that there was a violation. I'm just
16 suggesting it's an example of how content and making sure that
17 content is available across platforms is important and gives
18 choice.

19 **MS. WILKINSON:** I don't think anyone feels sorry for
20 Google because they decided not to put more money into Stadia.
21 That's their decision.

22 **THE COURT:** No, yeah, that's not what he's saying.
23 He's talking about the --

24 **MS. WILKINSON:** That doesn't mean there's lots of
25 incentives for people to develop content. And you heard about

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1 Game Pass, which is another incentive to --

2 **THE COURT:** We'll get there. I want to -- like, I'm
3 trying to divide it into two actually, the two markets. And
4 now we're on the console market and then we'll get to the --
5 because they've been joined together by the FTC -- the cloud
6 and the subscription market.

7 But with respect to the console market, we have proposed
8 agreements; right? We have --

9 **MR. WEINGARTEN:** We have Nintendo.

10 **THE COURT:** And a proposed agreement to Sony.

11 **MR. WEINGARTEN:** That's right.

12 **THE COURT:** And those were not evaluated by Dr. Lee.

13 **MR. WEINGARTEN:** No. No, and quite properly, in fact,
14 I think. And you saw what happened when Dr. Carlton tried to
15 attempt to evaluate them; right? We saw that it ran quickly
16 into some sort of legal analysis and his --

17 **THE COURT:** No. I guess more I'm saying I'm thinking
18 about the *AT&T* case --

19 **MR. WEINGARTEN:** Okay.

20 **THE COURT:** -- from the D.C. Circuit --

21 **MR. WEINGARTEN:** Yeah.

22 **THE COURT:** -- in which that's the closest thing I
23 think we have to a Court of Appeals case addressing the impact
24 of proposed agreements to address concerns raised by
25 regulators.

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1 And there I actually do think it was Dr. Carlton who was
2 in that case, another -- anyway, the district court discounted
3 the FTC's expert's opinion because the expert did not take into
4 account the agreement.

5 **MR. WEINGARTEN:** Right. There's a myriad of ways that
6 this agreement does not save this deal. One --

7 **THE COURT:** Okay. But so can we just, from a legal
8 point of view, because your brief in support of preliminary
9 injunction I think was a little broad and that it claimed they
10 essentially couldn't be considered or relevant, and I'm not
11 prepared to go there based on the law; but if you want to try
12 to persuade me, that's fine.

13 **MR. WEINGARTEN:** Well, I may try with your patience,
14 Your Honor.

15 So a couple of things. One, who bears the burden of
16 persuasion and production as to these agreements? Clearly the
17 Defendants have to. I can't come forward and poke holes in
18 things that I didn't create. It's up to them to explain why
19 these deals should save the bigger deal. Okay?

20 At this phase in a 13(b) proceeding we're really only
21 evaluating the Government's prima facie case, and so that's the
22 basis for us saying that's irrelevant then. We're here to see
23 if we raise substantial questions. We don't even get to these
24 other kinds of issues about remedies. That's one answer.

25 **THE COURT:** Well, so, I read the *Illumina* case, and

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1 there the Commission relied on a Supreme Court case to call
2 what *Illumina* was proposing a proposed remedy, but that Supreme
3 Court case was a case that was a remedy case after a finding of
4 a Section 7 violation.

5 So it actually didn't answer the question of when you're
6 trying to decide even a 13(b), whether there's a likelihood of
7 showing substantial competitive harm where the agreement goes.

8 But I understand that the Commission decided not that you
9 couldn't consider it -- although that was not a preliminary
10 injunction, that was a permanent injunction case -- but that it
11 didn't factor into the prima facie case and that the Defendant
12 would have the burden. Is that your position, that it --

13 **MR. WEINGARTEN:** Yes.

14 **THE COURT:** -- can be considered but the Defendant
15 raises it after you meet your burden?

16 **MR. WEINGARTEN:** Yeah. It is in the nature of the
17 evidence, like many other civil case context, that it has to be
18 the Defendants' burden of production and persuasion and,
19 therefore, it shouldn't be part of our prima facie case. We
20 come with our burden and they come with theirs.

21 And then when you overlay the 13(b), why we're all here
22 and the special standards that apply, that's when that part,
23 the Defendants' burden should, frankly, drop away because we're
24 not here to make that decision.

25 I will also add, to the extent that the Defendants have

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1 brought these agreements forward, and Your Honor is inclined to
2 consider them, we have heard zero evidence that they remedy
3 these deals, they remedy the bigger picture here.

4 We heard from Ms. Bond that she negotiated and signed one.
5 We heard from the Defendants that a person at Microsoft named
6 Lori Wright signed another or two. She never came. We heard
7 that these deals will be important and will matter.

8 We never heard any analysis of the competitive effects of
9 these deals. We never heard anyone from a third party with
10 whom they signed these deals come and say this deal is
11 magnificent and here's --

12 **THE COURT:** Well, Nvidia, Mr. Eisler said that he was
13 satisfied with it.

14 **MR. WEINGARTEN:** He was satisfied. He was also
15 satisfied with the side agreement to the side agreement that
16 they got.

17 **THE COURT:** Well, he was because he actually said it
18 would reduce his costs.

19 **MR. WEINGARTEN:** Yes.

20 **THE COURT:** Won't that enable them to better compete
21 with Microsoft's xCloud?

22 **MR. WEINGARTEN:** It might indeed, and --

23 **THE COURT:** That's pro-competitive; right?

24 **MR. WEINGARTEN:** Well, one wonders why that second
25 deal was added to the pot. And we heard about a series of

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1 concerns of Nvidia about signing the deal, but they signed it
2 nonetheless.

3 And there is a deal for Windows servers, I won't get into
4 it, but there is testimony about the role of that deal in sort
5 of sweetening the pot there.

6 **THE COURT:** It definitely sweetened the pot. I think
7 there's an inference to be drawn without it, it wouldn't have
8 happened; right?

9 **MR. WEINGARTEN:** Right.

10 **THE COURT:** Sure.

11 **MR. WEINGARTEN:** We have not heard sufficient evidence
12 about whether -- I'll take that. Thanks.

13 **THE COURT:** Let me turn first to Ms. Wilkinson.

14 Do you agree or accept there is some logic to it that the
15 agreements don't go into the prima facie case but they go
16 into -- I know, Mr. Sunshine. You haven't spoken this entire
17 hearing.

18 **MS. WILKINSON:** They can both speak, Your Honor. I
19 will step aside so they can both speak, but I would like
20 Mr. Kilaru --

21 **THE COURT:** Okay. It's a legal question, sure.

22 **MR. KILARU:** Your Honor, we don't agree with that,
23 that it just goes into the prima facie -- that it's not part of
24 the prima facie case.

25 I think in addition to AT&T, there's two very recent

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1 decisions that speak to this. So the first -- and we'll make
2 sure these are in the conclusions of law -- but one of them is
3 the *FTC vs.* -- and I'm not going to be able to pronounce this,
4 but I think it's *RAG*, R-A-G, *Stiftung* case where divestiture was
5 considered as part of the FTC's prima facie case.

6 **THE COURT:** Well, where divestiture was offered by the
7 Defendant?

8 **MR. KILARU:** Yes.

9 **THE COURT:** I see.

10 **MR. KILARU:** And then there's also the very recent
11 *United Health Group* case, which was both a horizontal and a
12 vertical case, that there were structural guarantees,
13 firewalls, consumer contracts, that kind of thing, that the
14 Defendants offered up. And the Court considered those in terms
15 of deciding whether the transaction was anticompetitive on I
16 think the very logical theory that you shouldn't evaluate
17 competitive effects in a world that will never exist.

18 **THE COURT:** They considered them in the first step on
19 the prime fascia case?

20 **MR. KILARU:** Yes.

21 **THE COURT:** The AL -- were those Commission cases or
22 ALJ cases?

23 **MR. KILARU:** The first was a Commission case. The
24 second was a DOJ case.

25 **THE COURT:** Do you want to -- are you familiar with

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1 those, Mr. Weingarten?

2 **MR. WEINGARTEN:** I'm familiar with *RAG-Stiftung*? I
3 litigated it.

4 **THE COURT:** Oh.

5 **MR. WEINGARTEN:** So in that case, it's a bit
6 different. This was a fully proposed divestiture. This is two
7 chemical companies that want to merge, and they said: We can
8 solve the FTC's concern by selling one of our factories. Fully
9 vetted. Fully discussed. We rejected the idea, and we
10 litigated on a full record of analysis and evidence about
11 whether it would solve the problem.

12 That is not the situation that is in front of, Your Honor,
13 with --

14 **THE COURT:** Well, so that's different, though, than
15 the legal question. That's sort of saying: Okay. Fine. You
16 can put it in your prime fascia case, but the evidence isn't
17 sufficient to defeat us making our prima facie case. That's
18 separate from saying it can't be considered.

19 **MR. WEINGARTEN:** And I don't want to concede. I want
20 to go back and check on whether that was not in the prima facie
21 case.

22 **THE COURT:** You'll have your chance.

23 **MR. WEINGARTEN:** Thank you.

24 **THE COURT:** Did you want to say something,
25 Mr. Sunshine?

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1 **MR. SUNSHINE:** Thank you. It's great, five days in
2 and finally I'm up here.

3 No, I agree with Mr. Kilaru of course, but I would add two
4 cases to Your Honor's consideration. One is the *Arch Coal* case
5 and the other is the *Libby* case. Both deal directly with this
6 question, Your Honor, about how the modifications to a
7 transaction affect the ability of how a Court should analyze
8 it.

9 And basically what both those courts say, that if there is
10 a deal that's already present that has modified the world going
11 forward, that's the job of the -- of the Government to prove
12 that in that world, competition will be lessened. It's not --
13 you know, I know the FTC would like the standard to be that
14 there's a burden on remedy, but that's not what the law is.

15 And here, what I think is even better than in the *AT&T*
16 *Time Warner* case, which were just agreements that we would
17 arbitrate, here we have a signed agreement with Nintendo and we
18 have, you know, the offer of an agreement, which precisely
19 solves the harm that's alleged by the FTC. It's access to Call
20 of Duty after 2025.

21 And these contracts deal precisely with that question, and
22 so the job, I think, for the FTC is to try to prove to
23 Your Honor that in that modified world that's going to go
24 forward in the but-for transaction, that they can satisfy their
25 burden.

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1 **MR. WEINGARTEN:** I want to make a very critical
2 factual distinction on those cases, Judge.

3 **THE COURT:** Yes.

4 **MR. WEINGARTEN:** As I mentioned with *RAG-Stiftung*, and
5 as I want to raise with respect to *Arch Coal* and the others,
6 there is a very big difference between a remedy that is a full
7 divestiture selling a factory, selling -- if they want to sell
8 Activision and keep King, they can put that on the table in a
9 proper proceeding, but a full divestiture and what we call a
10 behavioral remedy; that is, a contractual agreement of some
11 kind that is designed to address that harm.

12 And I will say I don't -- the burden in the circumstance
13 of a full divestiture is probably, for all practical purposes, in
14 the wash a little bit because the factory is either sold or
15 it's not and you analyze it.

16 Here, we have incredibly complex agreements. Defendants
17 entered them into evidence. They have complicated provisions.
18 Some are proposals. Some are agreed. We have testimony,
19 including from Nintendo, that they don't even really understand
20 the meaning of some of these provisions.

21 We have testimony from Nvidia that there are provisions in
22 there that make them nervous, including 7.4 in the Nvidia
23 agreement.

24 And the burden cannot be on the government to do a
25 complete legal analysis, offer up a legal expert, which would

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1 tread on the Court's province anyway, to complain why these are
2 not guarantees.

3 Now, that seems to me a burden that's properly on the
4 Defense to show why they are, in Dr. Carlton's word, a, quote,
5 "guarantee." They have not done that. The evidence is just
6 not in the record at all.

7 **MR. SUNSHINE:** Your Honor, where I part from my
8 colleague from the FTC, in the talk about a complete
9 divestiture, if this was a horizontal deal where we were
10 worried about direct competition between two products, I
11 understand the argument about a divestiture.

12 This is a vertical case where the harm that's alleged is
13 denial of access to Call of Duty, and so the remedy that's
14 being proposed, granted there are kind of factual questions
15 that you could argue about some of these terms, but at core,
16 it's a question about access to Call of Duty and that
17 completely solves the problems in this market as alleged by the
18 FTC.

19 **MR. WEINGARTEN:** I'm just going to take issue once
20 more with the words "completely solves," "guarantee." We saw
21 what happened. Dr. Carlton came and said "guarantee" and could
22 not --

23 **THE COURT:** Dr. -- I agreed with the cross was very
24 good. It's stricken. It has no -- no evidentiary value in
25 terms of whether it's guaranteed. I agree, the agreements are

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1 there and we have the testimony from the third parties and from
2 Microsoft.

3 **MR. WEINGARTEN:** And I think that, Your Honor, it is
4 not appropriate, I don't mean that in any sort of bad way, but
5 for the Defense to foist the agreements on the Court and say:
6 Here are these very complicated agreements. Take our word for
7 it, they're guarantees. And you at one point, Your Honor,
8 said: That's really a question for me about a legal issue of
9 the agreements.

10 But this case does not require and should not require
11 Your Honor to parse all the agreements, figure out what the
12 loopholes are, figure out if they're still worth doing. That,
13 with respect, should have come in the form of a full-remedy
14 proposal to the Commission and could have been evaluated and
15 worked on, et cetera.

16 **THE COURT:** Well, that's a different matter. If you
17 guys want to sit down and do that, more power to you.

18 **MR. WEINGARTEN:** I also want to add the issue here is
19 not just about Call of Duty comes to Nintendo or, you know,
20 we've reached agreements. It's about the quality of the
21 access. I think we've made that point in spades with the
22 Nintendo agreement.

23 **THE COURT:** Well, okay.

24 **MS. WILKINSON:** Can I address the partial foreclosure,
25 which I think is what he's talking about?

2 MS. WILKINSON: And, first, I think it's very
3 inappropriate to suggest that if you -- this went back to part
4 three, they could develop the case more. Discovery is closed
5 and Counsel knows that. We developed this whole case so we
6 could be lucky enough to get here, Your Honor, in front of you
7 and have a federal court decide this; and one of the agreements
8 we had with the FTC --

9 **THE COURT:** I know you actually didn't want to be in
10 front of me.

11 **MS. WILKINSON:** No, that's not true, Your Honor. We
12 wanted to be.

13 **THE COURT:** I saw those e-mails.

14 (Laughter)

15 **MS. WILKINSON:** I think we wrote them very self -- you
16 know --

17 **THE COURT:** It's okay.

18 **MS. WILKINSON:** -- we thought you would read them. We
19 said she's fantastic.

20 **THE COURT:** It's quite all right.

21 **MS. WILKINSON:** We wanted a quick hearing and you gave
22 it to us.

23 But it is really unfair for the FTC, who had an agreement
24 with us and knows that there will be no more discovery, there
25 will be no more analysis if we have to go in front of

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1 Judge Chapel.

2 But the real question is, they do have the burden of doing
3 a partial foreclosure analysis if that's their claim and it's
4 an easy but wrong answer to see they can't do it. There are
5 examples out there. They could have looked at what happened
6 when we took Ghost Loop exclusive. They could have -- or they
7 think they got a lesser game.

8 Final Fantasy 6, we just lost part of that game because
9 this year it didn't go on Xbox. It did last year. They could
10 look at Minecraft, as they pointed out, where we didn't have an
11 update for the PlayStation 5.

12 So there are many ways. I'm not, as everyone has been
13 saying, an economist but that is their job to figure that out
14 and to say: You want to stop a \$69 billion transaction, but
15 you can't figure out what the harm will be?

16 I think that answers the question. I mean, if they can't
17 figure out what the harm is, what they're turning to you or to
18 us to say, "You should figure it out. It's too hard"?

19 I mean, no witness said there was going to be partial
20 foreclosure. No one said that. No one had any examples of it.
21 And if it's a partial exclusivity, as you said and as
22 Mr. Nadella said, "I thought the best," that's the world we
23 live in because Sony is the market leader and that's what they
24 do.

25 So there are partial -- if that's what they want to call

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1 partial foreclosures, that's happening all the time with these
2 partial exclusivity or timed exclusivity arrangements, and that
3 is part of competition. It's not part of anticompetitive
4 behavior.

5 **MR. WEINGARTEN:** On the partial foreclosure, in terms
6 of evidence, I would respectfully point Your Honor to
7 Mr. Stuart's testimony this morning. He had some words to say
8 about partial foreclosure, I believe, and I believe Mr. Ryan
9 had some words to say about that in his testimony.

10 So the idea that we have not put forward evidence of
11 partial foreclosure I think is incorrect. We are not
12 suggesting that we have shirked our burden, not suggesting that
13 the Court or the Defendants are supposed to show that burden
14 for us.

15 We think we have adequately put in -- more than adequately
16 put in enough evidence to raise a substantial question about
17 whether there would be partial foreclosure given the
18 incentives.

19 And, again, Defendants always want to conflate this to:
20 Has the government shown that X will happen, that X is a
21 guarantee to happen? We are talking about the future.

22 The Supreme Court in *Philadelphia National* said, "We're
23 talking about probabilities here, not certainties." So we will
24 not accept a burden that we must and will show -- we are going
25 to talk about probabilities and show Your Honor there's a

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1 probability of a substantial lessening of competition.

2 I'm getting some notes. One is, the merger is permanent,
3 Judge. I don't want -- we know Your Honor won't be scared off
4 because of the size of the deal from making the right ruling,
5 but the merger is permanent. Once they decide to merge and
6 they come together, we've heard about the harms, for example,
7 to Sony in terms of optimization.

8 **THE COURT:** Well, it's not the harm to Sony we care
9 about. It's the harm to the consumers.

10 But let me -- Ms. Knox, do you need a break?

11 **THE OFFICIAL REPORTER:** Yes.

12 **THE COURT:** Ms. Knox needs to take a break so why
13 don't we resume at -- I didn't mean to cut you off but --

14 **MR. WEINGARTEN:** No, I understand.

15 **THE COURT:** And, actually, when we come back just so
16 you can prepare, let's start talking about that Xbox cloud
17 market. I think it's different there.

18 Okay. Thank you. We'll resume at 4:00 o'clock.

19 **THE CLERK:** No. 4:00? That would only be four
20 minutes.

21 **THE COURT:** Okay. 4:05.

22 **THE CLERK:** 4:05.

23 (Recess taken at 3:57 p.m.)

24 (Proceedings resumed at 4:09 p.m.)

25 **THE CLERK:** Remain seated. Come to order.

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1 **THE COURT:** Okay. We're going to resume.

2 **MR. WEINGARTEN:** One procedural and one substantive
3 housekeeping, Your Honor.

4 **THE COURT:** Yes.

5 **MR. WEINGARTEN:** One procedural, we did have slides in
6 anticipation of a more traditional closing. May I hand those
7 up?

8 **THE COURT:** Please.

9 **MR. WEINGARTEN:** Okay. Thank you. There's a copy for
10 the Defendants.

11 One substantive housekeeping. We are not here to protect
12 Sony. We are here to protect consumers. And so when I
13 mentioned the dev kits, the development kits -- right? -- if
14 this deal goes forward and Sony delays shipping development
15 kits to an Activision that is owned by Microsoft, I don't care
16 that it hurts Sony so much as I care that then Sony is delayed
17 in developing a game that the consumers can play.

18 **THE COURT:** Yes, but Sony currently has Microsoft's --
19 I mean, they ship dev kits to Microsoft.

20 **MR. WEINGARTEN:** They do. I understand they delay a
21 little bit because of --

22 **THE COURT:** All of them? I know there was testimony
23 with respect to ZeniMax. There was no testimony as to the
24 other titles.

25 **MR. WEINGARTEN:** Right. That one I don't know. I'm

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1 making an inference based on the testimony we heard, but I
2 don't know. But the testimony I think we did hear was there is
3 a hesitancy to share.

4 No, go ahead. My colleague Meredith Levert.

5 **MS. LEVERT:** Good afternoon, Your Honor. Meredith
6 Levert for the FTC.

7 We can put this in the findings of fact for you, but there
8 is some testimony in Mr. Ryan's deposition that talks about
9 their delay in giving development kits also for Minecraft, and
10 the reason for that being their concern about sharing extremely
11 sensitive information with their primary competitor. So we'll
12 point you to that in the findings of fact.

13 **THE COURT:** Okay. So there's testimony that it's all
14 titles they delay?

15 **MS. LEVERT:** That is my understanding, titles from
16 Mojang, which was acquired by Microsoft in 2014, and that would
17 be Minecraft and the more recent titles that are from ZeniMax.

18 **THE COURT:** No, I know, he -- I remember his testimony
19 as to the ZeniMax, or maybe it actually was Mr. Spencer's
20 testimony as to the ZeniMax actually.

21 **MS. LEVERT:** I think it was, yes.

22 **THE COURT:** Yeah.

23 **MR. WEINGARTEN:** So --

24 **THE COURT:** Okay. Actually, so that's a point.

25 And so let me ask Ms. Wilkinson about that.

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1 **MS. WILKINSON:** I believe, but I haven't looked back,
2 that it is only by Minecraft, Your Honor. I don't think it's
3 about others.

4 And as you know, that the original Minecraft game has
5 not -- there's not a new PS5 version, but the other Minecraft
6 games are on Minecraft Legends and Minecraft Dungeons. Excuse
7 me.

8 But the withholding of the dev kits is their decision. I
9 mean, that is -- this is not because they're getting harmed.
10 What they don't want to share, which they're perfectly allowed
11 to, they think that that's some kind of information that Xbox
12 can use against them so they gave them to them later, but that
13 is their decision. That is not a harm we are causing.

14 **THE COURT:** I mean, Microsoft provides dev kits to
15 Sony and we didn't have any testimony that they delay giving it
16 to them. I guess you would say PlayStation is the more popular
17 game because it's the better console, and so that's why they
18 don't delay, because they have nothing to hide.

19 **MR. WEINGARTEN:** Well, Your Honor, I was going to say
20 actually I don't think we have testimony either way on the
21 issue with respect to how Microsoft understands its dev kits.
22 So I just don't know on the record, Your Honor.

23 **MS. WILKINSON:** But it was -- Mr. Ryan was clear. It
24 was his choice, Your Honor, and that is, again, a business
25 strategy he can pursue; but as the market leader, to say that

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1 somehow because he doesn't want to get those games onto his
2 platform at the same time because he's making a strategic
3 judgment that Xbox should not see those dev kits too early,
4 that's fine, but he's making the decision for those consumers,
5 not Xbox.

6 And that's why we say they are protecting Sony and not the
7 consumers because Sony is making that decision for their own
8 consumers, and maybe that's one of the reasons that, you know,
9 they have twice as many players, I don't know, but that's not a
10 behavior that is caused by us --

11 **MR. WEINGARTEN:** Well --

12 **MS. WILKINSON:** -- and certainly not a competitive
13 harm.

14 **MR. WEINGARTEN:** Well, I think that the standard that
15 Ms. Wilkinson is applying is more like the sort of causal chain
16 that applies for traditional tort; right? You stepped in and
17 you caused this harm yourself.

18 We're talking about harms to the marketplace, and a
19 competitive or strategic response does not nullify the harm.
20 If the fact that Microsoft qua platform owns Activision means
21 that a rational competitive response is "I can't give you my
22 dev kits for Activision games," that doesn't excuse or mitigate
23 the competitive harm like it would if we were in a tort case
24 talking about --

25 **THE COURT:** How do I know that's a rational

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1 competitive response as opposed to a response that delays
2 Microsoft's ability to have the games and so it gives
3 PlayStation the opportunity to have them on their platform
4 first?

5 **MR. WEINGARTEN:** Well, because in the hypothetical
6 where the merger has taken place, Xbox has the games. They own
7 Activision. So Sony's only hurting itself --

8 **THE COURT:** Its own self.

9 **MR. WEINGARTEN:** -- because it's not giving the dev
10 kits. So the only reason it would hurt itself by not getting
11 the dev kits out there and getting the games developed is
12 because it's worried about what would happen if it gave up the
13 secret sauce on console.

14 And, again, the point is not the harm to Sony; it's that
15 the consuming public who loves these games, if you have a
16 PlayStation, now your game's later all else equal.

17 And I also -- I just want to point to Your Honor, we
18 were -- Ms. Wilkinson said no evidence of partial foreclosure,
19 two pieces of evidence.

20 One, Mr. Stuart this morning, I ticked with him a list of
21 partial foreclosure possibilities: Resolution, securities,
22 optimization.

23 The second piece of evidence, paragraph 35, PX8001,
24 Mr. Ryan's declaration (as read):

25 "Even making Call of Duty partially exclusive could

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1 cause substantial switching from PlayStation to Xbox."

2 And then he has quantitative evidence cited.

3 **MS. WILKINSON:** Your Honor, first of all, we're, I
4 think, using the terms the wrong way. There's "withholding"
5 and then there's "foreclosure."

6 And if we're talking about the dev kits, we have an
7 example before the transaction. We have Minecraft, as
8 I believe Mr. Ryan said, and I'm double-checking his
9 deposition, and I know it was his choice, and so he did not say
10 this was a competitive harm.

11 If that's a partial withholding, I will call it, that
12 would be another easy thing for them to have measured to see.
13 You certainly can see the market, and Xbox has not gained any
14 market share on Sony since that happened with Minecraft. They
15 have been behind and been third in the marketplace for years.

16 So by suggesting what they are what I would call a
17 possibility, anyone can dream up possibilities, and that's
18 literally what they're doing. They're giving you a list of
19 possibilities.

20 You don't have to find certainty but you have to find
21 probabilities, and that's when they need to provide evidence to
22 you; and just dreaming up what could happen when there isn't
23 evidence that that happened -- by Mr. Weingarten calling the
24 list with Mr. Stuart today foreclosure, he didn't say that was
25 foreclosure.

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1 **THE COURT:** No, I understand. I remember the
2 testimony.

3 Okay. Let's move on to Game Pass and cloud. So sort of
4 just spell out your theory there.

5 **MR. WEINGARTEN:** Okay. Quite simply, Your Honor, the
6 traditional market is consoles. The next big things that have
7 developed are a multigame library subscription market and
8 cloud. Subscription is more developed than cloud at this
9 point. The subscription service, I hesitate with analogies,
10 but like Netflix is the idea: You pay a monthly fee, you get
11 access to a library of games. The some services are just the
12 library.

13 I'll point you to -- I think we reproduced it in the
14 slides I gave you, but probably you've seen it many times --
15 Figure 22 -- oh, Slide 14 that I gave you, Your Honor.

16 Thank you.

17 This is reproduced from Dr. Lee's report. Some services
18 or products are just a library. Some of them are a library and
19 a cloud like Xbox Ultimate; right? You get the library and you
20 get to stream the library over the cloud. And some are just a
21 cloud.

22 These markets are emergent against subscription is more
23 established. The locus of competition is fierce in both. The
24 axis of competition is price and its content. And we've seen
25 from Microsoft documents their emphasis on cloud, the emphasis

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1 on subscription. Game Pass is a strategic driver for
2 Microsoft's gaming business. I think the evidence has been
3 very clear about that.

4 The evidence is also clear that the effect of this
5 transaction on Microsoft's ability to turbocharge Game Pass and
6 leave -- I think there's a document from Mr. Spencer -- leave
7 Google, leave Amazon -- right? -- everybody in the dust and
8 build the content moat around Microsoft's Game Pass is in the
9 record and compelling.

10 And there is a concern that if you take this content, you
11 use it to advantage your own platform, the consumer is harmed
12 because then the consumer doesn't have the benefit of
13 Mr. Kotick's platform agnosticism. The consumer says "If I
14 want Call of Duty, now I have to get the Game Pass; and if I
15 want this one, I have to get the other service." And maybe the
16 titles come out at different times, as opposed to Mr. Kotick's
17 world currently, I'll put the content wherever I can so players
18 can play it.

19 **THE COURT:** But he's not putting it on PlayStation,
20 Sony's, or Microsoft's subscription services.

21 **MR. WEINGARTEN:** He is on PlayStation Plus. He is on
22 PlayStation Plus, at least in some titles. And he was on
23 GeForce NOW for two and a half years. I'm sure we're going to
24 join issue on the future and what it holds for Activision
25 standalone.

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1 I will go back to the theme, Your Honor, of to believe
2 that Activision will put its content on more subscription
3 services and other cloud services is simply to believe they
4 will follow the money and act in their shareholders' best
5 interests.

6 To believe the Defense world that Activision on its own
7 will never, ever go into any of these other services is to
8 believe that Mr. Kotick's, respectfully, idiosyncratic view
9 will prevail over his need to maximize value for his
10 shareholders.

11 And, by the way, in testimony he explained very clearly he
12 will maximize value for shareholders. And in response to
13 Your Honor's questions, he couldn't prevaricate. If that's
14 where the users are, he's going there.

15 So the harm here, we think, is substantial in locking up
16 Activision content. I'm using terms like "locking up," but
17 there's also partial foreclosures and all of this area too.

18 But the harm is we end up in a world where instead of
19 having content available and new cloud services join and they
20 figure out a better way and they get Activision content or they
21 figure out how to share economics, it's all just with that,
22 it's all just Game Pass. And maybe Sony has PlayStation Plus
23 and we live in a world where those two suck up all the content
24 and that's it.

25 **THE COURT:** Well, what happens to Nvidia?

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1 **MR. WEINGARTEN:** So we hope Nvidia can survive. We
2 want the competition to be robust; but in a world where -- I'm
3 not here to predict the future about Nvidia's ultimate
4 survival, but in a world where we have a content arms race and
5 everybody starts buying up all the content and you end up with
6 one or two or three dominant platforms in cloud or
7 subscription, that is a less pro-competitive world than let a
8 thousand flowers bloom and let the content flow and let people
9 figure out arrangements that will bring consumers more of the
10 content in more ways.

11 That's a little highfalutin, but the evidence has, I
12 think, established the concern and has raised substantial
13 questions about the concern.

14 I will point Your Honor to pages 59 and 60 of the slides.
15 Mr. Spencer -- we have documents in the case that Mr. Spencer
16 was worried about a domino effect; that if somebody buys this
17 content, the next person has to buy the next content, and the
18 arms race or the domino effect continues and we end up in a
19 world that is less pro consumer with less choice.

20 I will dial it back from the highfalutin a little bit, and
21 I will say we have seen the evidence in Microsoft's own
22 documents. The emphasis on Game Pass, the value of content,
23 the fact that content leads to subscribers, leads to scale,
24 that's over and over again we saw in the documents and the
25 testimony from Microsoft's executives.

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1 And I will prebut a little by saying we've heard a lot
2 from Defendants "It's just a feature. It's not a market. You
3 know, subscription is another way just to buy the same old
4 game. Cloud is just a feature." Ms. Bond testified you use it
5 because you don't want to wait for, like, a load-up time on
6 your computer or on your Xbox.

7 I think we have heard more than ample evidence to rebut
8 that. They price it like its own product. They price it
9 against other competitors like a product. Microsoft offers the
10 cloud, totally apart from the console, on Samsung TVs.

11 We heard from Mr. Nadella. His testimony was robust in
12 favor of the idea that the cloud is the future and not just
13 some feature.

14 I'll pause there.

15 **MS. WILKINSON:** Your Honor, I'm going to start with
16 Ms. Bond's evidence. She gave evidence about what the cloud is
17 used for, and I want to call it cloud streaming because, as
18 Mr. Nadella pointed out yesterday, "cloud" to him is a much
19 broader category and that includes all kinds of gaming.

20 And when you think about that when someone's playing a
21 multiplayer game, kind of the backroom -- right? -- work that
22 is done so they can communicate in the cloud generally, that's
23 very different than what you're asking about, which is cloud
24 streaming.

25 Just that service of taking that game that's on the

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1 console and for Xbox in Game Pass and streaming it either to
2 the console again, as Ms. Bond told you, or onto another
3 device. That -- everyone said that that was not an
4 economically viable model right now. Everyone, including
5 Mr. Ryan.

6 **THE COURT:** Maybe right now, but growing. And, I
7 mean, I think -- I don't know. I'm not an expert on this.
8 But, you know, we don't have DVDs anymore; right?

9 **MS. WILKINSON:** Right.

10 **THE COURT:** And that's the way it's going, and those
11 consoles are going to disappear eventually; right? And so the
12 cloud -- and so what the FTC's concern is about the future. It
13 may not be here right now.

14 **MS. WILKINSON:** But many startups have folded when
15 they thought there was a market when there wasn't yet. The
16 fact that it may someday develop, I think Mr. Kotick made the
17 argument that it may not at all because it's going to be easier
18 to develop the native games for mobile because they're going to
19 be so powerful.

20 So people have different opinions. To speculate when it's
21 going to happen, I don't think any of us are qualified to say
22 when some new technical, you know, way to stream games will
23 actually be economically successful and attractive to
24 consumers.

25 **THE COURT:** Okay. But so what's -- and I have to --

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1 we all have to remember to slow down for Ms. Knox.

2 **MR. WEINGARTEN:** Apologies.

3 **THE COURT:** I think we nearly killed her before.

4 (Laughter)

5 **THE COURT:** But so what are you saying with respect to
6 their cloud argument, is that nothing -- that the merger is
7 pro-competitive? That -- just what is it? Other than to say
8 you're not saying it's a -- like, yeah, what is it that you're
9 saying?

10 **MS. WILKINSON:** It is a feature and in Xbox, which is
11 what's at issue, it is only offered with the Game Pass, that
12 you can't buy it as a separate product.

13 But we only have three charts, Your Honor, but one is the
14 one I made yesterday -- the other day with Mr. Lee, which is
15 you can just look at this picture and the entire merger is
16 pro-competitive because it's expanding output.

17 He didn't -- he couldn't answer the key question you and I
18 asked him, which is: Is it likely that PlayStation will or
19 will not have Xbox?

20 But if you look down the rest, today you have Call of Duty
21 on Xbox, PlayStation, and PC. With the merger, you're going to
22 have it with all these other streaming services. So if that is
23 a market, they're all going to have the ability to stream the
24 game, which they don't have today, which is the test.

25 **THE COURT:** Okay. So that's what I -- so I get when

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1 you brought the case, that wasn't there; right? In substance
2 you won and you got what you wanted and you forced them to go
3 out and enter into these agreements. And maybe it also helped
4 that they at least seemed to be less bullish on cloud, but they
5 went out and they signed these agreements now with Nvidia to
6 give them Activision's content. How is that not good for
7 consumers?

8 **MR. WEINGARTEN:** So a couple of points. We have
9 testimony from Mr. Zimring and from Nvidia about the
10 profitability and the future of cloud so I want to point
11 Your Honor there. If there's any concern about the future,
12 this is not a dream state.

13 On the agreements point, we, again, have evidence that
14 there are agreements. We do not have any evidence from
15 Defendants of anything beyond the fact that there are
16 agreements.

17 We learned, if we can make the negative inference,
18 I guess, from Dr. Carlton, he doesn't know where Ubitus is
19 headquartered. It's Hong Kong. Boosteroid is in Eastern
20 Europe.

21 So the Defendants have not even shown Your Honor that
22 entering these agreements will have any pro-competitive effect
23 in the United States of America.

24 **THE COURT:** Can I stop you for a second?

25 **MR. WEINGARTEN:** Yes.

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1 **THE COURT:** Why would Nvidia --

2 **MR. WEINGARTEN:** Yes.

3 **THE COURT:** -- do what they did and say what they
4 said? Because they're a competitor to Microsoft in cloud --

5 **MR. WEINGARTEN:** Yes.

6 **THE COURT:** -- gaming. So why did they do it then?

7 **MR. WEINGARTEN:** Do it meaning switch to support the
8 merger?

9 **THE COURT:** Yes.

10 **MR. WEINGARTEN:** Yes, okay. A couple of reasons.
11 One, they got a deal that they had been wanting for a long time
12 on Microsoft's own content. Now, that doesn't count under the
13 law because it's not merger specific. That's a deal that could
14 have been achieved any day whether we were here or not, whether
15 Microsoft were buying Activision or not, but it was a
16 sweetener. They got that deal.

17 They got the Windows addendum. Another sweetener.

18 They also testified, Mr. Eisler, that they have concerns
19 about their deal on the Activision content. Okay? They have
20 concerns about that part of the deal, and this goes back to
21 what we were talking about before about whose burden is it to
22 bring forward persuasion and production on what these
23 agreements actually mean.

24 And I want to be very clear with Nvidia. Whether the
25 Activision deal goes through or not, they get the Microsoft

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1 content that they've coveted for quite a while. That means
2 it's not merger specific, so it's not part of the competitive
3 analysis, but it sure does mean that Nvidia had a healthy
4 incentive to sign the agreement they signed and support the
5 deal because whatever happens, they now have that Microsoft
6 content.

7 I will also note part of the problem with having the
8 Defendants run around signing deals in this fashion is they are
9 picking -- let's assume the deals are fantastic for a moment --
10 they are picking the winners and the losers. There's no deal
11 between Microsoft and Google for cloud. There's no deal
12 between Microsoft and Amazon for Amazon's cloud multigame
13 library service. So now we're saying, according to Defendants:
14 Don't worry, we've picked some competitors inside the U.S. and
15 out. Bracket, outside the U.S. shouldn't even count. We'll
16 pick the winners and the losers and then we'll come to court
17 and say, "Well, we picked some winners and, therefore, we're
18 being pro-competitive.

19 And the fact is there is no evidentiary record for
20 Your Honor to even begin to weigh their claims that they have
21 remedied the concerns.

22 **THE COURT:** Well, but in the but-for world there's no
23 agreements. There's no agreement with Amazon. There's no
24 agreement with Google. There's no agreement with Nvidia, and
25 maybe Nvidia then doesn't survive.

1 **MR. WEINGARTEN:** I would submit --

2 **THE COURT:** Well, no, we're not going to go there.
3 That's not a failing company.

4 **MR. WEINGARTEN:** No, no, and I don't mean to imply
5 anything about Nvidia's abilities or anything like that.

6 So I would submit, at best, when Ms. Wilkinson did her
7 chart with Dr. Lee -- Professor Lee, question marks at best
8 about how this content may or may not get to Ubitus,
9 Boosteroid, Nvidia.

10 I would submit in the but-for world, because of the
11 testimony we heard from Mr. Kotick and what we know about
12 incentives to put content on platforms, question marks as well.

13 So we are dealing with a world of future. It's
14 probabilities as Ms. Wilkinson properly said. Question marks
15 all around; but the question is: Have we raised enough
16 questions to merit further inspection of this deal and have we
17 raised further questions, given all the documentary evidence
18 and testimony about the role of AAA content in driving scale,
19 subscribers, and a moat -- Microsoft's executive's word -- a
20 moat around Game Pass?

21 So I think that's where we land on that. Even if I can
22 see at best, I think it's question marks everywhere and we
23 still carry our burden.

24 **MS. WILKINSON:** Well, Your Honor, he may want to
25 testify again for his expert, but the expert said these things.

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1 That's who they presented. He didn't like what he had to say,
2 but I gave him every chance to answer those questions as did
3 you.

4 **MR. WEINGARTEN:** I can say --

5 **MS. WILKINSON:** You asked him -- excuse me.

6 You asked him three different times to try and get him to
7 answer on Call of Duty whether he even did the analysis. He
8 said no. When he knows he wants a question mark, we put it
9 there.

10 He did not say it was uncertain and, therefore, couldn't
11 be probable. He agreed that in every one -- that with every
12 one of those other organizations, that it would be likely with
13 the merger that that would -- that content would be distributed
14 by those folks.

15 **THE COURT:** Well, respectfully, Professor Lee is not
16 an expert on that; right? He doesn't read contracts and those
17 things. Same thing goes with Dr. Carlton. So I don't -- I
18 mean, I look at his economic analysis, but with respect to -- I
19 mean --

20 **MS. WILKINSON:** I think that's a different issue,
21 Your Honor, you're right, but he was in the business of saying
22 what's going to happen in the but-for world and what's going to
23 happen with the merger -- again, not certainty but
24 probabilities -- and he couldn't say. That's why he was called
25 as an expert, to say exactly that.

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1 Now, when you put the contracts down, these are
2 sophisticated parties. Nvidia is a trillion-dollar company.
3 They had lawyers on the other side. These are not complicated
4 agreements. In fact, you heard Mr. Spencer say and Mr. Ryan,
5 that normally with publishing, they have general publishing
6 agreements. They don't even come to a different agreement for
7 a specific game.

8 The only reason there are specific agreements here is
9 because the regulator complained. And so now because the
10 regulator raises issues, they're basically saying "You did what
11 we wanted but we don't like the way you did it, and you have to
12 prove to us somehow that a contract" -- which should be
13 presumed to be in the best interests of both parties, which
14 whether it's sweetened or not, that's how competition and
15 capitalism is supposed to work.

16 If that's how we get them to distribute Call of Duty, so
17 what? People and companies come to those agreements all the
18 time. The question is: What is the output through those
19 agreements? And there's no dispute that these games are
20 going -- that Call of Duty is going to be on these services if
21 the transaction goes through.

22 So you asked and I asked every one of our executives
23 whether they would honor these contracts. They said it in open
24 court, they said it to you under oath, and they've said it for
25 the last year.

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1 Do we honestly -- are they honestly suggesting that they
2 weren't credible? That they're going to get up in a public
3 courtroom in front of you and lie about whether they would
4 honor these contracts? I mean it's absolutely absurd, it
5 really is, to suggest that Satya Nadella got up in your
6 courtroom and said he would honor -- in fact, he doesn't even
7 like exclusives. He would like his content to be everywhere,
8 by the way, which has been incredibly successful.

9 **THE COURT:** He was clear that it was Mr. Spencer's
10 domain.

11 **MS. WILKINSON:** And Mr. Spencer said the same thing.
12 It's in his interest. Again, it's not because everyone is a
13 saint. It's because it makes economic sense and reputational
14 sense to put that content on these different platforms.

15 And why does it? You -- remember, they offered this to
16 Sony the day after the deal. So it's not just for the
17 regulators. It was easy for Xbox and Microsoft to do because
18 it was consistent with their business strategy.

19 So it wasn't asking them to do something that they hadn't
20 thought about. In fact, they didn't own the content. I
21 thought Ms. Bond was pretty clear, it made a lot of sense to
22 say: Why don't you usually -- why did you -- you didn't do
23 this before. Well, we didn't own the content. Most people
24 don't contract for things they don't own.

25 They had told these folks they would do it; and then when

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1 the regulators raised issues, they did it. There's nothing
2 that was pointed out about these contracts. They're ten --
3 some of them, as you know, with the Sony offer, ten-year
4 contracts. And we heard undisputed evidence that there's
5 nothing like that in this industry. It was unusual so there
6 would be no dispute here that that content would stay on
7 PlayStation.

8 And you heard through Ms. Hood's declaration and everyone
9 else they need those revenues. It makes sense.

10 **THE COURT:** On the console.

11 **MS. WILKINSON:** Yes.

12 **THE COURT:** It would stay on PlayStation on the
13 console.

14 **MS. WILKINSON:** Right. And it makes sense for them to
15 distribute as many ways as they can because if people play
16 their games, they make money.

17 **MR. WEINGARTEN:** I have a couple of points there,
18 Your Honor.

19 So one is, I have no idea what Ms. Wilkinson is talking
20 about when she says we told them to go make these deals and now
21 we're complaining about the deals. That is not how the process
22 has unfolded.

23 **THE COURT:** It's not evidence in the hearing.

24 **MR. WEINGARTEN:** We want to make very clear what we
25 are not alleging. I'm not alleging that Microsoft or the

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1 theory of the case is not that Microsoft will breach or that
2 Mr. Nadella is committing perjury. That is not our theory of
3 the case.

4 However, if one is going to propose, like Defendants have,
5 a complicated set of remedial contracts, behavioral remedies in
6 antitrust parlance, those contracts are only as good as their
7 terms. And we have had undisputed testimony in this case from
8 at least two of the third parties who signed those contracts
9 about their concerns with the terms, Mr. Singer and Mr. Eisler.
10 Both gave undisputed testimony that they had concerns about the
11 terms.

12 **THE COURT:** Mr. -- I read through -- I read
13 Mr. Singer's whole deposition. I -- he just didn't know the
14 terms.

15 **MR. WEINGARTEN:** He's the primary negotiator for
16 Nintendo, and there you have it.

17 **THE COURT:** Well, what I read in the -- in the
18 transcript was that there was a representation by a lawyer that
19 he was, but he didn't say anything in that -- in that -- I
20 can't -- I can't -- I think that's over-arguing to say that he
21 said he had concerns with the terms. He didn't know the terms.

22 **MR. WEINGARTEN:** I will --

23 **THE COURT:** Or he couldn't -- no, I don't -- I don't
24 think so. They did sign it, and it is Nintendo. It's not some
25 little --

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1 **MR. WEINGARTEN:** They did sign it, Your Honor.

2 **THE COURT:** -- startup.

3 **MR. WEINGARTEN:** They did sign it, Your Honor.

4 **THE COURT:** Yes.

5 **MR. WEINGARTEN:** I will also say that's -- Dr. Carlton
6 made the argument in his report that if you sign it, it must be
7 because you think it's ironclad and the greatest deal on earth.

8 I will also submit you sign it because it's an option;
9 right? This is fantastic, from Nintendo's perspective, to have
10 at least this option now, and that's great for them; but does
11 that mean, again, that it's a guarantee and that it remedies
12 all of the harms?

13 **THE COURT:** Well, why does it have to be a guarantee?

14 **MR. WEINGARTEN:** Well, if it's not a guarantee, then
15 it's not offsetting the anticompetitive concerns.

16 And we have no evidence about what they do anyway. I
17 thought Defendants would come, frankly, and bring Your Honor
18 and say "We've run the numbers. If we sign these deals, X
19 million more people will get the game." We were told, in fact,
20 they ran no numbers. Okay?

21 We were told that there was no analysis for these
22 apparently amazing deals that -- we were either told it's easy
23 to get to and there's a standard agreement, but these are pages
24 and pages long and outside the standard agreement depending on
25 what day we heard from the Defendants, but we have no analysis

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1 and no record for Your Honor to assess the alleged
2 pro-competitive benefits.

3 And the concern also is that Microsoft in going around and
4 signing these deals, they're setting the terms of market
5 competition on their own; right? They're off saying "Now
6 assume we've got this content. Here are these terms."

7 And I'll note again, no terms with Google. No terms with
8 Amazon. So they're picking and choosing, and then they're
9 putting the agreements in and saying "Just the bare fact of the
10 agreement with no analysis suffices." That cannot be correct.
11 It cannot be correct.

12 **MS. WILKINSON:** Your Honor, we know these parties know
13 how to say no because Sony has refused thus far to say no.

14 **THE COURT:** Can you address -- the point that was made
15 throughout the hearing was that no financial analysis was done,
16 which seems odd; right?

17 **MS. WILKINSON:** It does, I think, if you don't
18 understand the business, with all respect. They put games on
19 other people's platforms and on their own all the time. That's
20 why they have that general publishing agreement. They don't do
21 a big financial analysis because they know what the split will
22 be in the revenue; and if the game is a game that they want,
23 they don't -- they don't sign a new contract for every single
24 game that comes up. So they don't do a financial analysis
25 every time they put a game on. If you were to look through

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1 their files beyond for other games, they don't produce a
2 financial analysis every time.

3 **THE COURT:** Right, but this is Call of Duty and
4 they've signed an agreement to put it on Nintendo; right? And
5 that will --

6 **MS. WILKINSON:** There's no downside, Your Honor. How
7 could it be anything but beneficial to them when they can get
8 the game on one of the biggest and most successful platforms
9 there is?

10 So they know from what they've done in the past for these
11 big popular games how successful they are, and they already
12 know how Call of Duty does on other platforms. So they --

13 **THE COURT:** But how do they know that the people that
14 then -- when Call of Duty is available on the Switch, that they
15 won't then leave Xbox?

16 See, when Xbox -- when you buy your Call of Duty on Xbox,
17 Microsoft gets a hundred percent; but when you buy it on
18 Nintendo, they get less because they have to share it with
19 Nintendo.

20 **MS. WILKINSON:** Right.

21 **THE COURT:** So --

22 **MS. WILKINSON:** That's true.

23 **THE COURT:** -- to the extent that it extends to new
24 people, that's true, but there was no analysis done --
25 right? -- with respect to the de-val and all that and whether

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1 it would create a gap and all that to extend that to Nintendo
2 because if your argument's correct and Nintendo is a substitute
3 and should be part of the market, it's going to take some of
4 those sales away from the Xbox.

5 **MS. WILKINSON:** Right, but it's also gaining one, the
6 people who have Nintendo and aren't playing Call of Duty right
7 now because they don't have it.

8 And you heard Mr. Kotick, Mr. Spencer, Mr. Nadella tell
9 you they're more successful when they put it on more platforms.
10 This is why they can't find an example of another existing
11 multiplatform, multiplayer game that anyone would take off the
12 platforms. It doesn't make sense. It makes more sense, like
13 Minecraft. Look what they do. They have it on 20 different
14 platforms. Under what you're suggesting, they should have a
15 financial analysis every time to see whether they lose gamers
16 or not.

17 **THE COURT:** That's not my suggestion. It was the
18 FTC's. I'm just asking you to respond.

19 **MS. WILKINSON:** Right. There's -- there's not that
20 kind of financial analysis done when there's upside for them by
21 getting as many gamers to play and play with each other as
22 possible. And they believe that's successful not because
23 they've just seen it; but I think as Microsoft, as you heard,
24 that's kind of in their culture, that they've been quite
25 successful with their other software products by putting them

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1 on as many platforms as possible. Minecraft is one of the most
2 successful games, and you've seen the data in the sealed
3 documents, because it's on so many platforms.

4 So there was no need to figure out whether -- they've
5 already figured out that staying on the PS5 is, you know, very
6 positive when they did the entire valuation and they figured
7 out how much revenue they would get and would get for the next
8 five to ten years depending on the outlook from those revenues.

9 So why would they think they're not going to -- and maybe
10 they'd lose some gamers. As you say, some of these people own
11 multiple devices already, but why would they think they need to
12 do an in-depth analysis to say if they make it available to
13 140 million more gamers, they won't get additional revenue?
14 Plus they get the endgame spend; right.

15 **MR. WEINGARTEN:** I hear a lot of argument and a lot of
16 pivot to Minecraft but no evidence, and I'm not suggesting --
17 put it this way: I think Mr. Stuart was credible in the sense
18 that he does a lot of analysis and a lot of scenario planning.
19 And to suggest that there is no analysis or scenario planning
20 because this is just putting a title on another platform is
21 directly at odds with defense's other argument that these are
22 world-creating amazing agreements that are unprecedentedly
23 large.

24 **THE COURT:** So then what is the inference that you're
25 asking me to draw.

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1 **MR. WEINGARTEN:** The inference I'm asking you to draw
2 is that there is no evidence that these have any
3 pro-competitive effect whatsoever in the marketplace.

4 **THE COURT:** Wait a minute. How can putting
5 Activision's content on Nvidia's cloud -- how is that not a
6 positive for consumers?

7 **MR. WEINGARTEN:** It could be and it would be, but we
8 don't know because we also have not had any evidence that that
9 is what will result from this agreement. In fact, we've had
10 evidence from Nvidia they have concerns about the agreement.

11 But I also want to point out, Judge, this was an issue we
12 briefed, we sought discovery about all these agreements and we
13 were shielded. The discovery was shielded under privilege.

14 **THE COURT:** I'm just going to stop you there because,
15 I mean, again, now we're in unique land and the problem is that
16 we are on this compressed; right? If this had been brought to
17 me or some other judge closer in time to when you filed your
18 complaint and you filed your preliminary injunction motion,
19 then we would have had time to do that.

20 I would never have said, "You're held to what happens in
21 this administrative proceeding." I would have adjudicated all
22 those things; but because -- I'm sure you had good reasons --
23 it was done this late, we didn't have that opportunity.

24 So I don't know what happened in there, and don't tell me
25 because it's not going to make any difference in my decision.

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1 I have the evidence that's in front of me, and I -- and that's
2 it, and I can draw an inference from the lack of evidence.
3 That's why I asked you what it is, but --

4 **MR. WEINGARTEN:** I will say it is not about wishing we
5 had a motion to compel process that had been seen through. I'm
6 actually not challenging the assertion of the privilege. If
7 they told us, which they did, "We did a lot -- if we did any
8 analyses, they were with lawyers, they were about understanding
9 legal implications of the agreements," fine. That sounds like
10 a plausible privilege claim.

11 But I can't then also have a Defendant show up and give
12 half the poker cards over and say "Actually, we think they're
13 really super pro-competitive" while withholding the actual
14 analysis I need to understand it or contest it.

15 **THE COURT:** Well, I think they're saying they're not
16 withholding anything.

17 **MR. WEINGARTEN:** There's just nothing. Okay. Well,
18 then --

19 **THE COURT:** That's what Mr. Stuart says, there's just
20 nothing.

21 **MR. WEINGARTEN:** So I would take from the inference
22 that there's just nothing, that there's no great effect to
23 these agreements because if there were any material effect,
24 there must have been a model or a discussion. The evidence in
25 the record is that some of these were hastily agreed to:

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1 Ubitus, Boosteroid.

2 Some other evidence in the record -- Mr. Eisler's
3 deposition Mr. Fisher's -- is that they were hastily agreed to
4 on the eve of other regulatory proceedings for a press
5 conference.

6 I think the inference that can be drawn is they were
7 hastily agreed to and that there can be no inference of
8 pro-competitive effect from that circumstance.

9 **THE COURT:** Well, why? I mean, they were hastily
10 agreed to in response to regulatory concerns, no question;
11 right?

12 **MR. WEINGARTEN:** Correct.

13 **THE COURT:** No question. They're not arguing anything
14 different. They agree.

15 **MR. WEINGARTEN:** Right.

16 **THE COURT:** That's why I say in many ways you won
17 because you and the other regulators have forced them. Now,
18 whether it's sufficient or not is a different matter, but you
19 did get them to -- at least they say they were committed all
20 along, but you got them to do something earlier.

21 **MR. WEINGARTEN:** And I'm not being facetious in saying
22 this. If we had felt like we had won, I would declare victory
23 and go home. I don't think we won because that is not, first
24 of all, how the process is supposed to unfold.

25 Second of all, we have no evidence of what the effects of

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1 these agreements will be so I cannot declare victory on behalf
2 of consumers.

3 I have the same thing that you have, Your Honor, evidence
4 that there are agreements. Nothing more. That's it. And if
5 Ms. Wilkinson were right, that this was Microsoft's master
6 plan -- and I agree it's not, it's regulatory -- it's not in
7 the deal model. The deal model is all about Microsoft's
8 products and services so that's what I have to look at.

9 And I have no evidence -- and, respectfully, neither does
10 the Court -- that these agreements are going to engage in any
11 pro-competitive benefit for anyone. Reminder, some of them
12 involve companies in Hong Kong, Eastern Europe. They're not
13 even in the market, so it is --

14 **THE COURT:** Well, it depends on the market. I mean,
15 and we didn't even get into that.

16 And I don't know for cloud, is someone sitting in the
17 United States can't download or can't use those services?

18 **MR. WEINGARTEN:** I don't know; right? As a
19 theoretical matter, can someone go on the internet? Maybe but,
20 again, there's no evidence from the Defendants.

21 **THE COURT:** Well, no, no, no, but you initially have
22 to tell me the relevant market.

23 **MR. WEINGARTEN:** Yes.

24 **THE COURT:** So tell me why the cloud gaming company in
25 Hong Kong is not part of the relevant market.

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1 **MR. WEINGARTEN:** Two reasons. One is a lack of
2 evidence. I don't know if their terms allow people in the
3 United States to download this and no one in this case does.
4 There's -- I don't think there's anything in the record that
5 they even do business here. Literally, I don't think Ms. Bond
6 was asked. I don't think she knew. Nobody knows. So that's
7 one.

8 Two is, latency. I would posit I don't know where their
9 servers are and, for goodness sake, if they're in Hong Kong
10 with a server, I would argue that a product in Hong Kong is not
11 a reasonable substitute for a cloud service in the United
12 States.

13 **THE COURT:** That's probably true. With respect to
14 cloud streaming, I think that's true.

15 **MR. WEINGARTEN:** One more on this, Judge. The
16 antitrust law requires verification of the benefits.

17 I apologize. I'm supposed to slow down. Okay.

18 One of the requirements if you're going to present as a
19 Defendant a pro-competitive benefit, is that it has to be
20 verified. We have to verify what these benefits will be.
21 Quantification, something. That's not an FTC thing. That's a
22 legal test. It's in the horizontal merger guidelines, which is
23 an FTC thing, but also in the court -- in the case law,
24 I believe.

25 No one from the defense evidence has verified them.

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1 Dr. Carlton, we talked to him, did not verify very clearly.

2 Dr. Bailey testified she didn't know about the consumer welfare
3 effects of any of these terms.

4 So I don't -- there is no verification. It's another more
5 doctrinal version of the argument I've been making. Absent
6 verification, they are a nothing, respectfully.

7 **THE COURT:** All right.

8 **MS. WILKINSON:** Your Honor, they are part of the deal
9 and part of the output; but if you -- I'm going to take what
10 counsel just said. He now said the deal model is the only
11 thing that shows. Yes, it shows an analysis of keeping COD on
12 PlayStation. So we already have that that's going to happen.

13 And he said, "Well, why don't you have more financial
14 analysis or way of measuring it?" We have a way of measuring
15 it. We also have Minecraft that's on Play -- which we heard
16 from Mr. Stuart this morning is more successful or generates
17 more revenue on the other platforms than it does on Xbox.

18 So there is a base analysis, and the fact that this is
19 increasing output further and wasn't part of the model, it was
20 part of the plan, and the fact that it is going to generate
21 more gamers, there's no question that it's pro-competitive.

22 I don't even understand. You said it yourself: How could
23 it be that if more consumers are going to get access to it,
24 it's not beneficial? I mean, it's -- what do you call it? --
25 the benefits are just increasing output as, you know, as part

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1 of the deal? Either way, more consumers are going to get the
2 game and that's good for gamers, but it's also good for
3 Microsoft.

4 **THE COURT:** Can I ask you about the X -- the X Pass?

5 **MR. WEINGARTEN:** The Game Pass?

6 **THE COURT:** Game Pass. Game Pass.

7 **MR. WEINGARTEN:** Yes, ma'am.

8 **THE COURT:** I do think that is not clear that Call of
9 Duty may be on Game Pass and not on PlayStation Plus.

10 **MR. WEINGARTEN:** Correct. And Mr. Ryan had testimony
11 that the terms --

12 **THE COURT:** That I read and --

13 **MR. WEINGARTEN:** -- and the offer are --

14 **THE COURT:** -- that I understand. That I understand.

15 But explain to me why. Let's say, because as I understood
16 Mr. Ryan, for example -- I keep calling it the Thor game
17 because I can't remember.

18 **MS. WILKINSON:** God of War.

19 **THE COURT:** God of War. Is that on PlayStation Plus?

20 **MR. WEINGARTEN:** Yes. I actually don't know.

21 Is God of War -- I'm getting head nods. Yes.

22 **THE COURT:** Yes? Yes.

23 **MS. WILKINSON:** Not day and date.

24 **MR. WEINGARTEN:** Okay.

25 **THE COURT:** Not day and date.

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1 **MS. WILKINSON:** I don't know if it's an older catalog
2 game, but not day and date.

3 **THE COURT:** But anyway, he testified they see it a
4 little differently and it's more like a catalog. And if Call
5 of Duty were on Game Pass but not on PlayStation Plus, wouldn't
6 that just incentivize Sony to up their game, so to speak, on
7 the PlayStation Plus? To improve the content? To maybe make
8 stuff available more immediately? In other words, it would
9 increase competition at opposed to decrease competition.

10 **MR. WEINGARTEN:** Well --

11 **THE COURT:** Because it's not available on
12 PlayStation Plus right now. So unlike the console, it's not
13 taking anything away from anybody. Nobody has the ability
14 right now to pay just a subscription and get Call of Duty.

15 **MR. WEINGARTEN:** So I guess a couple of things. One,
16 they might. There might be agreements; right? This is the
17 likelihood of Mr. Kotick bringing his content to other places.
18 There are possible future agreements so Sony could say to
19 Activision "We've got to have it. Here is the offer," and they
20 reach terms.

21 If this deal goes through that Microsoft proposes, that
22 terminates for all time -- right? -- the ability of an
23 independent Activision to ever reach an agreement with Sony.
24 So I just want to be clear about the but-for world and the
25 world we are in if this deal goes through.

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1 Another point I'll make to Your Honor is, if the response
2 from Sony -- if this deal goes through, hypothetically, Sony's
3 response is "We got to go buy another big developer of content
4 and keep adding content," and it's the domino effect from
5 Mr. Spencer's e-mail.

6 We will have in our conclusions of law the case law that
7 that is an aggravating, not a mitigating factor.

8 **THE COURT:** No, no, no. I'm not saying -- I'm just
9 saying with their own content that they already have --

10 **MR. WEINGARTEN:** Yes.

11 **THE COURT:** -- to make it available at the same time
12 that they release the games.

13 **MR. WEINGARTEN:** Possible, but a non-problematic or a
14 less problematic, from the antitrust law perspective way to
15 achieve that, would be if Game Pass loves Activision content,
16 reach a deal short of a merger, and pay them. And if they work
17 out that deal and Sony says in response, "Gosh, we need our own
18 deal or we need to change how we operate," that's good
19 competition.

20 But taking Activision content 100 percent in-house and
21 foreclosing for all time a future deal between Activision and
22 PlayStation, or who knows what as to be invented subscription
23 service, that is anticompetitive.

24 **THE COURT:** But how -- how -- again, and play that out
25 how the consumer is harmed. Because I still don't understand

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1 why Sony, then, just won't make their PlayStation Plus better.

2 And, again, how many people -- you're only going to pay
3 for the subscription to Call of Duty, the \$15 a month or the \$8
4 a month, if you like the other mix on the games because
5 otherwise it's cheaper to just pay -- right? This is why I
6 actually am trying to figure out the market.

7 **MS. WILKINSON:** Your Honor, that isn't quite right
8 because, remember, to -- unless they're playing by themselves,
9 they still have to subscribe for the multiplayer monthly fee.
10 So it's not like you either buy it for \$70 and you have no more
11 fees. You still have to pay monthly to play it either on
12 PlayStation or Xbox.

13 There -- we showed you, we didn't spend much time on it,
14 there's four subscriptions --

15 **THE COURT:** Yes.

16 **MS. WILKINSON:** -- and the first one is just for
17 multiplayer.

18 **THE COURT:** So you can't do multiplayer without a
19 subscription?

20 **MS. WILKINSON:** Without a monthly subscription.

21 **THE COURT:** Both? Both?

22 **MS. WILKINSON:** Yes.

23 **MR. WEINGARTEN:** So turning back to your question, why
24 doesn't Sony just do it, I don't know.

25 **THE COURT:** Can I just stop one second?

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1 **MR. WEINGARTEN:** Sorry, Your Honor. Yes.

2 **THE COURT:** But in terms of if you have a PlayStation
3 to play multiplayer, is that in the agreement that was offered?
4 Does that agreement include that the people on PlayStation will
5 still always be able to have that option to do the multiplayer?

6 **MS. WILKINSON:** That's up to them because it's the
7 consumer who buys that. It wouldn't -- Xbox would not stop
8 PlayStation 5 players from being multiplayer because that's
9 what you purchase on the PlayStation website.

10 **THE COURT:** Okay.

11 **MR. WEINGARTEN:** Reminder about Mr. Ryan's concerns
12 about the whole offer on PlayStation Plus in response to that.

13 **THE COURT:** No, no, I understand that.

14 **MR. WEINGARTEN:** Okay.

15 **THE COURT:** That's a different -- that's a different
16 issue.

17 **MR. WEINGARTEN:** On why doesn't Sony put their games
18 day and date, I don't know. I don't think we have a lot of
19 record evidence about why.

20 I'll get a snort from the defense bar; but as a regulator,
21 a law enforcer, I am agnostic if they have a competitive
22 strategy that they think helps them invest and make good
23 competition in various markets, but it is not an adequate
24 response by Defendants to buying this content to say, "Good.
25 Now Sony will do the same thing we want to do and build a

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1 walled garden of their own." There's case law that's not the
2 right thing to do.

3 Also, again, there's no evidence that that is a benefit.
4 We don't know. The Defendants, if they were to posit that as a
5 benefit, good, everybody builds walled gardens and we all buy
6 content and day and date is better. We have no evidence that's
7 true so we just don't want to interrupt the flow of how the
8 competition is currently working.

9 **THE COURT:** And it all comes down, again, to Call of
10 Duty.

11 **MR. WEINGARTEN:** I keep hesitating slightly.

12 **THE COURT:** Yeah, but, I mean, that's where the
13 evidence is; right? That's the driver because there are
14 acquisitions that happen, there are games that happen, and
15 we're here because of Call of Duty. I just want to be clear so
16 I know what to focus on.

17 **MR. WEINGARTEN:** No question, it is critically
18 important and it's the driver of the revenues. I only hesitate
19 because they just have some really other great franchises that
20 are huge.

21 **THE COURT:** As do -- you know, as does Warner Brothers
22 have the number one game, at least it was, earlier this year --
23 right? -- of Hogwarts. Like, you just don't know. And there
24 are lots of other games.

25 I mean, the other thing I'm just struggling a little bit

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1 with -- and you can help me -- is this industry is very
2 different in that it's amorphous and it changes all the time
3 and it's completely dynamic, and what video game -- I know Call
4 of Duty has had enduring but other games have -- come and go
5 just like MySpace or TV shows or whatever, and I'm trying to
6 figure out why --

7 **MR. WEINGARTEN:** So --

8 **THE COURT:** -- why the emphasis is just so much on
9 Call of Duty. I mean, isn't there an argument that that will
10 force someone to come up with another good annual game or some
11 other thing? I mean, after all, Mr. Kotick started from
12 essentially nothing, but he was able to do it; right?

13 **MR. WEINGARTEN:** So taking your last point first, I'm
14 sure that Call of Duty being great inspires people to try to be
15 the next Call of Duty. We don't need this merger to do that.
16 So Call of Duty existing in the universe on its own already
17 accomplishes that.

18 **THE COURT:** No, no. Yeah, I'm getting more whether
19 there is an anticompetitive effect.

20 **MR. WEINGARTEN:** Right. So Microsoft buys the Call of
21 Duty. Why do we care? Yes, because it is unique in so many
22 ways. It is every year. A lot of these games, they don't do
23 every year a title. Not only is it every year, it's number one
24 every year. And the one disappointment Mr. Kotick pointed to
25 was still number one. It's a heck of a disappointment.

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1 So it is unique. And the modeling that we saw from
2 Microsoft shows how unique it is. Now, that model is not just
3 Call of Duty; right? They modeled all the content. But it is
4 a huge number. It is a hugely popular game. It has revenue
5 generation that is off the charts year after year.

6 So that's why -- that is part of why we're here, for sure,
7 Your Honor. If they were buying a much smaller game, we
8 probably would have made a regulatory law enforcement judgment
9 to spend resources elsewhere, but here we are because it is
10 incredibly powerful.

11 And I'll take it back down from the 50,000-foot to the
12 evidence. We have seen from the testimony, the documents about
13 Microsoft strategy, about the role of AAA, the role of content
14 in every single one of these markets how essential content is,
15 and it's something that I believe Your Honor and I were talking
16 about way at the beginning of session that content is key.

17 And this is key content and it is a game that gamers want
18 to play. And that incentive, once you own the game that gamers
19 want to play, means you're going to put it where you can drive
20 users to play it with you.

21 **THE COURT:** Some gamers want to play.

22 **MR. WEINGARTEN:** Sure. Sure.

23 **THE COURT:** Right?

24 **MR. WEINGARTEN:** Enough to make --

25 **THE COURT:** It's a minority.

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1 **MR. WEINGARTEN:** But enough to make billions of
2 dollars in revenue. So almost any product, I'm -- not
3 everybody drinks Coca Cola, but if Coke and Pepsi merged, we'd
4 be here; right? So not everybody --

5 **THE COURT:** Hopefully not here.

6 (Laughter)

7 **MR. WEINGARTEN:** Apologies.

8 But if not everybody uses it, but our concern is with the
9 consumers who do and may one day want to use it.

10 **MS. WILKINSON:** Your Honor, it's not an essential
11 input. There's a big difference between it being necessary,
12 which is what the case law says, and being the popular, you
13 know, enduring, wonderfully successful game. No one disputes
14 that.

15 It's one piece of content. There's no case that says one
16 piece of content will tip a market; or if one competitor gets
17 it, you know, there won't -- there will be harm to competition.

18 And you can think about it. If we go back to the old days
19 when some of us only watched three networks, there's much more
20 content now -- right? -- because there's these subscription
21 services. More content has been generated, to your point, to
22 go back and forth. There are enduring franchises. Everyone
23 would like to own the Bond franchise, I'm sure, in the
24 streaming world but only one company owns it now. It doesn't
25 mean all these other competitors aren't successful.

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1 The same with *Seinfeld*. Name your favorite show. There
2 are certain types of content or individual pieces of content
3 that are extraordinarily popular, but Sony has many of those
4 too, like God of War, my favorite.

5 **THE COURT:** But did Sony develop God of War itself?

6 **MS. WILKINSON:** Yes, as far as I understand it.

7 **THE COURT:** I think that's their point.

8 **MS. WILKINSON:** Here is?

9 **THE COURT:** We wouldn't be here if Microsoft had
10 created Call of Duty. It's the purchasing it; right? That the
11 argument is and the theory behind the antitrust laws and the
12 whole case is that -- and, yeah, the whole theory behind
13 Section 7 is that we don't benefit from just buying up each
14 other. We benefit from keeping things separate and, therefore,
15 incentivizing people to create themselves.

16 **MS. WILKINSON:** That's not true. We want smaller
17 folks to create content; right? And the fact that someone
18 purchases -- and they're not small anymore, Activision, but, as
19 you say they were originally.

20 The fact that they produced popular content and someone
21 else wants to buy to distribute it and then someone else wants
22 to make more content, I mean, that's the art that's going on
23 whether it's movies, gaming, or television. And no one says if
24 you don't have this one game or this one television program or
25 movie, you can't compete.

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1 I mean it's kind of -- it's an odd suggestion. It's not
2 the type of essential input, you know, that you need a widget
3 and the widget seller -- you're buying the widget seller so
4 nobody else can purchase those widgets.

5 Whether PlayStation created its games, it also contracts
6 for them. Final Fantasy XVI, as someone pointed out to me,
7 it's called XVI for a reason. It's been out there for a long
8 time and it's been very successful. You don't have to have an
9 exact replacement. No consumer is entitled to have the exact
10 piece of content they want.

11 But in this case there's lots of competitors. As you
12 said, this is a small part of the market. It's incredibly, you
13 know, successful. I don't think that -- I know that doesn't
14 equate to being essential and something that one party cannot
15 own, especially in light of the promises and contracts that
16 they're going to distribute far and wide, and that all of the
17 documents, Your Honor, every piece of evidence, everyone who
18 came here, whether it was from Microsoft and Activision or from
19 Mr. Kotick, said it makes sense to keep it on multiple
20 platforms.

21 And counsel has not pointed to one piece of evidence, one
22 document, that says Microsoft was thinking about holding it
23 back. Nobody did that analysis. Nobody asked for that. And,
24 again, why didn't they do that financial analysis? Because it
25 doesn't make any sense to them economically and based on their

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1 good business judgment.

2 **MR. WEINGARTEN:** All right. I have quite a bit there.
3 If I may, Your Honor, just very briefly.

4 **THE COURT:** Okay.

5 **MR. WEINGARTEN:** If we had that document, Judge, I
6 don't think we would have had to file the case at all if the
7 document was "We're going to hold it back and exclude and be
8 anticompetitive."

9 I also think we have not had full access to whatever they
10 may have claimed privilege over in their very --

11 **THE COURT:** I'm not --

12 **MR. WEINGARTEN:** No, but I think it's unfair for
13 counsel to point to evidence of absence as saying, "Oh, well
14 that means it didn't exist or didn't happen." But I'll move
15 on.

16 The case law does not require that we show something as a
17 must have. The scarcity and the need for this content is why
18 they shelled out 8 billion or 7 and a half billion for ZeniMax
19 and \$70 billion now.

20 **THE COURT:** But not -- not just for Call of Duty.

21 **MR. WEINGARTEN:** No. But we seem to be going back and
22 forth on they're getting some other things, but I think
23 Microsoft's model has been very clear and the documents about
24 using the Call of Duty franchise to drive subscribers and
25 scale.

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1 I also want to say, when Defense Counsel says "It's just
2 like *Seinfeld* or a TV show being on one subscription service or
3 another," Mr. Kotick came and he had a warning about that
4 world. His testimony was he hates that world. He said he came
5 from Los Angeles and that world has been death for creators.

6 **THE COURT:** Which is why he won't put the games on
7 Game Pass or up in the cloud?

8 **MR. WEINGARTEN:** Right.

9 **THE COURT:** Right? So I don't --

10 **MR. WEINGARTEN:** But --

11 **THE COURT:** I mean, you point that out and that
12 suggests --

13 **MR. WEINGARTEN:** No, but I --

14 **THE COURT:** -- without the merger, then people aren't
15 going to have it available to get it by subscription.

16 **MR. WEINGARTEN:** Or -- I have the nuance, if I may,
17 Your Honor -- or he reaches deals with everybody and gets paid
18 by everybody instead of just getting in one subscription
19 service. So instead of *Seinfeld* just being on Netflix, or
20 wherever it is, the people who own *Seinfeld* reach their deal
21 with Netflix and Peacock and Disney Plus and we have more
22 access instead of the walled garden.

23 So Mr. Kotick is, I think, savvy about his own business.
24 He said he hates the world that Ms. Wilkinson just said is
25 where they're going.

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1 **THE COURT:** Okay. Can we go to the balance of the
2 equities, which we get to if there's showing of a likelihood of
3 success?

4 And *Warner* is the Ninth Circuit case -- right? -- that I
5 look at and sense that. And we know that private equities,
6 while they can be considered, they can't alone counter-show --
7 or justify denial of a preliminary injunction.

8 (Pause in proceedings.)

9 **THE COURT:** *Warner* then said if the record is
10 conflicting on the anticompetitive effects, the public
11 entity -- the public equities there, including beneficial
12 economic effects and -- or if -- sorry -- you know what *Warner*
13 says.

14 But what I want to get to is *Warner* then said there, even
15 though we have conflicting evidence so we can't say that the
16 public equities include these beneficial economic effects or
17 advantages for a consumer if we stop the merger now because
18 there's conflicting evidence, there was a different public
19 equity there which was if the merger happened, it was going to
20 be very difficult to divest.

21 **MR. WEINGARTEN:** Uh-huh.

22 **THE COURT:** Right? It was going to be very -- and
23 here, my understanding is it's going to be a parent-sub
24 relationship. And so really the only question here is, as you
25 said, is to stop the merger.

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1 We know there are some private equities. They've been
2 publicly stated. That's why we're here in such a rush. And so
3 then what is the countervailing public equity that you would
4 point to?

5 **MR. WEINGARTEN:** Sure. The fact that Defendants say
6 they will keep Activision as one of their limited enterprises
7 and somewhat at or removed from Microsoft is not the same as a
8 hold separate. So the harm will start the day the deal closes
9 and it will start that day because that is the day Mr. Ryan,
10 and anyone else who makes content for platforms, will start
11 looking a different way at Activision and sharing proprietary
12 information about their platform.

13 So it's not just about Sony, although we have the evidence
14 from Sony, who's going to contact Activision and say, "Great.
15 Here is my new platform. Can we optimize Call of Duty for this
16 new platform that's going to do six new things? That would be
17 great if we worked together" the day after the merger because
18 that info goes to Microsoft.

19 The harms do start, Your Honor, immediately. This is not
20 coal factories. This is intellectual work and it's about
21 partnerships. And so there is one public equity that starts
22 right away.

23 I would also say -- we'll put it in our conclusions of
24 law -- the private equity, their interest in simply doing their
25 deal, which I know is very important to the Defendants, cannot

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1 outweigh the public's interests in ensuring a full
2 adjudication.

3 **THE COURT:** No, no. That's what I said.

4 **MR. WEINGARTEN:** Yeah.

5 **THE COURT:** However, *Warner* recognized that there's
6 still -- that they're not irrelevant. They're not irrelevant
7 and you still have to identify some public equity.

8 **MR. WEINGARTEN:** Yes.

9 **THE COURT:** I know you have, but I'm just looking
10 right at *Warner*; right?

11 **MR. WEINGARTEN:** Yes.

12 **THE COURT:** Yeah.

13 **MR. WEINGARTEN:** So the public equity, Judge, is that
14 the harms in this case start immediately.

15 **THE COURT:** Okay.

16 **MS. WILKINSON:** I want to address that. That's just
17 not true with Call of Duty.

18 As you know, there is a contract that's going through the
19 end of 2024, that came into evidence, to ensure that Call of
20 Duty stays on PlayStation till at least then.

21 **THE COURT:** Yeah. So that's --

22 **MS. WILKINSON:** Even if Sony doesn't accept our
23 offer -- and, again, I just want to say, Your Honor, how can it
24 be withholding when they don't want to agree with us?

25 **THE COURT:** Okay.

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1 **MS. WILKINSON:** But regardless of what Microsoft
2 wants, there's indisputable evidence that they follow their
3 contracts when they acquire studios. The government proved
4 that for us.

5 **THE COURT:** Yeah, what about that? I mean --

6 **MR. WEINGARTEN:** I'm not sure I follow the point even.

7 **MS. WILKINSON:** They made a big deal -- I'm sorry,
8 Your Honor.

9 **THE COURT:** No dev needs to be sent over to Microsoft.
10 Call of Duty that's being released in November will be released
11 on PlayStation.

12 **MR. WEINGARTEN:** Yes.

13 **THE COURT:** So your August 2nd hearing can go forward.
14 Nothing is going to happen, at least that I -- I mean, I guess
15 what I'm saying is, you guys should address it in your
16 submissions to tomorrow.

17 **MR. WEINGARTEN:** I would also -- there is -- it is not
18 static. This is not just about, "Oh, let's wait for the next
19 contract negotiation." Microsoft is hard at work on its next
20 console. PlayStation is hard at work on its next console. And
21 the record evidence is that these conversations about
22 optimizing for a new generation take place years before.

23 **THE COURT:** I don't know. That's why I'm saying just
24 point it out in your -- in your submissions.

25 Okay. So appreciate the argument.

So tomorrow, as I said, I've given you this time deadline because I want to save your holiday weekend; but by 5:00 p.m. tomorrow, your proposed findings of fact and conclusions of law, which may be submitted under seal, along with a Word version e-mailed to Ms. Means.

(Laughter)

MS. WILKINSON: I'm not going to say anything,

My colleague has a quick logistical question, please.

I just have a quick question about when the actual date to file the public version of the filings that we'll be submitting to Your Honor next Friday? We had talked to Defendants and a date to offer --

THE COURT: By next Friday, you mean tomorrow?

MS. FLEURY: Right. So we're submitting --

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1 **THE COURT:** Oh, the non --

2 **MS. FLEURY:** -- the nonpublic versions --

3 **THE COURT:** Yes.

4 **MS. FLEURY:** -- of our findings of fact and
5 conclusions of law by tomorrow.

6 **THE COURT:** What would you like? When do you think
7 you can get your -- knowing that we have a holiday.

8 **MS. FLEURY:** We discussed and floated July 12th as a
9 potential date, assuming that works for Your Honor's schedule.

10 **THE COURT:** Could you do the 7th? No? Is that too
11 hard?

12 **MR. WEINGARTEN:** This is the lifting of just doing all
13 the redacting and the sealings.

14 **MS. FLEURY:** Right, and reaching out to the third
15 parties.

16 **THE COURT:** And no Sharpies.

17 **MS. FLEURY:** All the evidence -- yes. In light of the
18 holiday next week, we were floating that idea. We could get it
19 done earlier, but that was what we were discussing with Defense
20 counsel.

21 **THE COURT:** I don't know. What do you think?

22 **MS. WILKINSON:** Your Honor, if we --

23 **THE COURT:** So the findings of fact and conclusions of
24 law that you initially submitted, redacted versions are on the
25 docket?

CLOSING ARGUMENTS

1 **MS. WILKINSON:** Yes.

2 **THE COURT:** Okay. The 12th is fine.

3 **MS. FLEURY:** Thank you, Your Honor.

4 **MS. WILKINSON:** We just don't want that to slow down
5 your opinion, and you've been generous with your time and we
6 realize that, but --

7 **THE COURT:** No, that won't -- let me tell you, what I
8 decide, I don't know when I'm going to get it out, but
9 obviously I'm mindful. So don't expect, you know, for the
10 judges that take two or three months on these to get the same
11 work product. I'm sorry.

12 **MS. WILKINSON:** Appreciate it.

13 **THE COURT:** I'll file my order under seal, and then
14 I'll ask you to provide me jointly with your proposed
15 redactions. Also try to write it in a way that we don't need
16 so many redactions.

17 Frankly, and someone -- someone may very well appeal. I
18 leave it on you to tell the Ninth Circuit where in the record
19 those kinds of things. That will help speed things up quite a
20 bit.

21 Lastly, I do want to congratulate the parties on your
22 presentation and your civility. It was pretty extraordinary.
23 I don't get to see this level of advocacy very well. You were
24 on tight deadlines. I was pretty, you know, demanding in terms
25 of documents and things. You all met them.

CLOSING ARGUMENTS

1 Everyone -- I especially want to -- the FTC, because I'm a
2 government employee, you don't have quite the same resources
3 they do and yet your team was able to keep up with that in
4 terms of that presentation, and I'm very much appreciative of
5 both sides.

6 Yeah, I'm going to do my best. It's hard, that's all I
7 can say, but I very much appreciate the presentation that
8 everyone did and I also appreciate how both sides gave many
9 attorneys the opportunities to take witnesses. I think that
10 was to your benefit and to your clients' benefits because it
11 enabled the presentations, I think, to be better because you
12 were sharing that. So spread that word.

13 Okay. All right.

14 **MS. WILKINSON:** Thank you very much, Your Honor.

15 **THE COURT:** Yes?

16 **MS. FLEURY:** I do have one housekeeping matter.

17 **THE COURT:** Of course.

18 **MS. FLEURY:** I'm sorry to end on that note.

19 **THE COURT:** That's all right.

20 **MS. FLEURY:** We had several sealed portions of videos
21 that I wanted to make sure both that Your Honor has them and
22 has access to them, and I also wanted to move to admit the clip
23 reports for some of those videos and the underlying material.
24 It's really just the actual clip reports that we thought would
25 be helpful to have numbers admitted into the record.

CLOSING ARGUMENTS

1 **THE COURT:** Okay. I did read the transcripts in full.
2 So I read them all of Mr. Singer, Mr. Eisler, Mr. Fisher.

3 **MS. FLEURY:** And it's Mr. Fisher and Mr. Eisler as
4 well as the Ryan -- Mr. Ryan's sealed clip report that we were
5 hoping to just admit into evidence quickly.

6 **THE COURT:** Sure.

7 **MS. FLEURY:** So the -- Mr. Ryan's sealed clip report
8 is PX3378.

9 Mr. Fisher's sealed clip report is PX3379.

10 Then Mr. Fisher's public clip report is PX3380.

11 Then Mr. Eisler's sealed clip report is PX3381.

12 And then Mr's. Eisler public clip report is PX3382.

13 And the Mr. Fisher full deposition transcript is PX7062.

14 **THE COURT:** All of those exhibits are admitted.
15 (Trial Exhibits 3378, 3379, 3380, 3381, 3382, and 7062
16 received in evidence.)

17 **MS. FLEURY:** Thank you, Your Honor.

18 **MR. WEINGARTEN:** Thank you, Your Honor.

19 **THE COURT:** All right. Thank you.

20 (Proceedings adjourned at 5:19 p.m.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Thursday, June 29, 2023



Marla F. Knox, CSR No. 14421, RPR, CRR, RMR
United States District Court - Official Reporter